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No. 4150 1368

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT /

JAMES C. DAVIS, Agent, United States Railroad Administration (Southern Pa- cific, Company),	}	Plaintiff in Error,
vs.		
A. J. PARRINGTON,		
Defendant in Error.		

TRANSCRIPT OF RECORD

On Writ of Error to the United States District Court
for the District of Oregon.

FILED

NOV 27 1923

P. M. MONTGOMERY

CLERK

NAMES AND ADDRESSES OF COUNSEL

WILSON & GUTHRIE,

Platt Building, Portland, Ore.,

Attorneys for Defendant in Error.

JOHN F. FINERTY,

Assistant General Counsel, United States
Railroad Administration, Washington, D. C.

A. M. BULL,

United States Railroad Administration,
Washington, D. C.

PAUL P. FARRENS,

Yeon Building, Portland, Ore.,

Attorneys for Plaintiff in Error.

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(In conformity with stipulation of counsel printed at page 188 of this Transcript, the caption, titles, clerk's endorsements, and other formal matters appearing in the original papers, not material to this hearing, are omitted therefrom.)

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No.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES C. DAVIS, Agent, United States Railroad Administration (Southern Pa- cific, Company),	}	Plaintiff in Error,
vs.		
A. J. PARRINGTON,		
		Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the United States District Court
for the District of Oregon.

On the 30th day of October, 1923, there was duly
filed in the District Court of the United States for the
District of Oregon the following

CITATION ON WRIT OF ERROR

• United States of America,
District of Oregon—ss.
To A. J. Parrington, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein James C. Davis, Director General of Railroads, as agent United States Railroad Administration (Southern Pacific Company) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 30th day of October, in the year of our Lord, one Thousand, nine hundred and twenty-three.

R. S. BEAN,
Judge.

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 30th day of October, 1923.

JAMES G. WILSON,
Attorney for Defendant in Error.

On October 30th, 1923, there was issued the following Writ of Error:

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Director General, as
Agent United States Railroad Adminis-
tration (Southern Pacific Company)

Plaintiff in Error,

vs.

Writ of

Error.

No. L-8845

A. J. PARRINGTON,

Defendant in Error.

The United States of America—ss.

The President of the United States of America.

To the Judge of the District Court of the United States
for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between A. J. Parrington, Plaintiff and Defendant in Error, and James C. Davis, Director General, as Agent United States Railroad Administration (Southern Pacific Company), Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with

this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 30th day of October, 1923.

G. H. MARSH,

Clerk of the District Court of the United
States for the District of Oregon.

By F. L. BUCK, Chief Deputy.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT
OF OREGON,

July Term, 1921.

BE IT REMEMBERED, That on the 16th day of September, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a complaint at law in words and figures as follows, to-wit:

AT LAW COMPLAINT

Comes now the plaintiff and for cause of action against defendant alleges:

I.

That the defendant is the duly appointed, qualified and acting agent of the United States Railroad Administration, appointed under Section 206-A of the Transportation Act of Congress of 1920, and has authority to represent said Railroad Administration in defense of this action.

II.

That the Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is and was during all the times mentioned in plaintiff's complaint the owner of a line of railroad extending from points in California hereinafter referred to, to Portland in the state of Oregon; that the Oregon, Washington Railroad & Navigation Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and is the owner of a line of railroad extending from Portland, among other points, St. Johns, in the state of Oregon.

III.

That San Francisco, Marysville, Hamilton, Crockett, and other points designated in the tariff hereinafter referred to as "Group 1 Points", Alvarado, Salinas, Visalia and Betteravia are points in the state of California, and all of said points with the exception of Betteravia are located on the line of the Southern Pacific

Company; that Betteravia is a point located on the line of the Santa Maria Valley Railway, which connects with the line of the Southern Pacific at Guadalupe; that the stations designated as Portland, East Portland and St. Johns are all in the state of Oregon and within the corporate limits of the City of Portland, Oregon; that the lines of the Southern Pacific Company and the Oregon, Washington, Railroad & Navigation Company reach the stations known as Portland and East Portland within the corporate limits of the City of Portland, and the line of the Oregon, Washington Railroad & Navigation Company extends to and through the station of St. Johns within the corporate limits of the City of Portland, but the said station of St. Johns is not reached or touched by the line of the Southern Pacific Company.

IV.

That from and after 12 o'clock noon of December 28th, 1917, to midnight of February 29th, 1920, which period will hereinafter be designated as the period of federal control, the United States Railroad Administration was in control of the said lines of railroad of the Southern Pacific Company extending from various points in California, including those in the preceding paragraph mentioned, to Portland in the state of Oregon, and was likewise in possession during said period of the line of railroad of the Oregon, Washington Railroad & Navigation Company, including that portion thereof between the stations of Portland and St. Johns

within the corporate limits of Portland, state of Oregon, and was operating said lines of railroad as a common carrier in interstate commerce under the authority of the United States and the Director General of Railroads, and pursuant to the tariffs, rules and regulations for such purpose adopted and provided.

V.

That at Portland, Oregon, the line of railroad of the Southern Pacific Company connects with the line of railroad of the Oregon, Washington Railroad & Navigation Company; that heretofore and prior to the period of federal control the Southern Pacific Company published and filed with the Interstate Commerce Commission Supplement 26 to Pacific Freight Tariff Bureau Joint and Proportional Tariff 1B, Interstate Commerce Commission No. 110, and by item 815-B thereof established a rate on sugar in car load lots of minimum weight of 44,000 lbs. to be applied on transportation of sugar from the points in California above in Paragraph III named to the stations of Portland and East Portland, to be applied on shipments when destined to points on the line of the Oregon, Washington Railroad & Navigation Company beyond Portland and East Portland; that the said proportional rate so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1, was 13c per 100 lbs.; from Salinas and Visalia, 20½c per 100 lbs.; and from Betteravia, 23c per 100 lbs.; that it was provided in said

tariff and supplements thereto that rates from said originating points in California to points on the line of the Oregon, Washington Railroad & Navigation Company should be made by adding the said proportional rate so established to the local rate from Portland or East Portland established by the Oregon, Washington Railroad & Navigation Company from Portland or East Portland, including rates to stations on the Oregon, Washington Railroad & Navigation Company line contained in said company's tariff No. 6-B, I. C. C. No. 283, effective March 15th, 1914; that in and by Supplement No. 57 of said Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1-B, I. C. C. 110, effective June 25th, 1918, which said supplement was published and filed with the Interstate Commerce Commission, said proportional rate from said points in California to Portland and East Portland, Oregon, was increased so that the rate from and after said 25th day of June, 1918, became $16\frac{1}{2}c$ per hundred pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado, and Group 1 points to Portland and East Portland; $25\frac{1}{2}c$ per hundred pounds from Salinas and Visalia to Portland and East Portland; and $29c$ per hundred pounds from Betteravia to Portland and East Portland; which said rate was continued in effect by said supplement and reissues of said tariff up to and subsequent to the termination of federal control.

VI.

That the Oregon, Washington Railroad & Navigation Company published and filed with the Interstate

Commerce Commission its local tariff No. 6-B, I. C. C. No. 283, effective March 15th, 1914, wherein by Item 70 it established and put into effect a rate, from its stations of Portland and East Portland to its station of St. Johns in the state of Oregon, of $37\frac{1}{2}c$ per ton of 2000 lbs. with a minimum charge of \$7.50 per car, which said rate applied on sugar in car load lots; that said rate was continued in effect by said tariff and supplements and reissues thereof up to and including the 30th day of December, 1919; that thereafter in and by supplement No. 23 of the Oregon, Washington Railroad & Navigation Company's local freight tariff No. 6-C, I. C. C. 312, Item 60-G, published and filed with the Interstate Commerce Commission and made effective December 31st, 1919, the said Oregon, Washington Railroad & Navigation Company established a rate from its station of Portland to its station of St. Johns of \$7.50 per car when received from its connections at Portland, which said rate continued in effect until the termination of federal control.

VII.

That the United States Railroad Administration adopted and continued in effect the rates of the Southern Pacific Company and the Oregon, Washington Railroad & Navigation Company hereinbefore referred to, established before federal control, and joined in and were parties to the changes in said rates established during federal control as hereinbefore referred to.

VIII.

That the station of St. Johns is more distant from

San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas, and Betteravia over the line of the Southern Pacific Company and the Oregon, Washington Railroad & Navigation Company by the route over which said rates are established as hereinbefore alleged than the station of Portland, and the haul over said route between said points in California to Portland is included within the haul over said route to St. Johns, and is in the same direction and over the same line or route, and the haul to Portland over said route is included within the haul from said points in California to St. Johns.

IX.

That on all shipments over said route from Crockett, Port Costa, a point in Group 1, Alvarado and Salinas, from January 1st, 1918, to and inclusive of June 24th, 1918, the said defendant charged and collected the sum of 23c per 100 lbs. on sugar in car load lots; and from San Francisco to Portland charged and collected the sum of 20c per hundred pounds; from Betteravia and Hamilton, the sum of 25c per 100 lbs.; and from Visalia the sum of $27\frac{1}{2}$ c per 100 lbs.; and in addition thereto collected thereon war tax at the rate of 3% of the transportation charge; and on all shipments between and inclusive of June 25th, 1918, and December 30th, 1919, charged and collected thereon from Crockett, Port Costa, Alvarado and Salinas the sum of 29c per 100 lbs.; from San Francisco 25c per 100 lbs.; from Betteravia and Hamilton, $31\frac{1}{2}$ c per 100 lbs.; and from Visalia $34\frac{1}{2}$ c per 100 lbs.; that from and inclusive of

the 31st day of December, 1919, to the end of federal control said defendant collected and received on shipments of sugar to Portland in car load lots from Crockett, Port Costa, Alvarado and Salinas 29c per 100 lbs.; from San Francisco 25c per 100 lbs.; from Betteravia and Hamilton $31\frac{1}{2}$ c per 100 lbs.; and from Visalia $34\frac{1}{2}$ c per 100 lbs.

X.

That on all of the shipments hereinafter specified the said United States Railroad Administration exacted and charged as war tax at the rate of 3% of the charges collected; that said charges were to the extent that the same exceeded the rate established and in effect from the various points in California to the station of St. Johns at the same time illegal and unlawful, and charged without the authority of law, and the exaction of a war tax on the excess of such charges over said rates from said respective points in California to St. Johns was illegal and unlawful and exacted without authority of law, and in violation of Section 4 of the act of Congress known as the Act to Regulate Commerce and amendments thereto, and that the only lawful rate in effect from January 1st, 1918, to and inclusive of June 24th, 1918, was as follows: From Crockett, Port Costa, Alvarado, San Francisco and Hamilton $14\frac{7}{8}$ c per 100 lbs.; from Betteravia $24\frac{7}{8}$ c per 100 lbs.; and from Visalia and Salinas $22\frac{3}{8}$ c per 100 lbs.; plus war tax of 3% upon the transportation charge; that the only lawful rate to Portland from June 25th, 1918, to and inclusive

of December 30th, 1919, from the various points in California was as follows: From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, $18\frac{3}{8}$ c per 100 lbs.; from Betteravia $30\frac{7}{8}$ c per 100 lbs.; and from Visalia and Salinas $27\frac{3}{8}$ c per 100 lbs.; plus war tax of 3% upon the transportation charge; that the only lawful rate in effect to Portland from said various points in California between the 31st day of December, 1919, and the end of federal control was as follows: From Crockett, Port Costa, Alvarado, San Francisco and Hamilton $16\frac{1}{2}$ c per 100 lbs. plus \$7.50 per car; from Betteravia 29c per 100 lbs. plus \$7.50 per car; and from Visalia and Salinas $25\frac{1}{2}$ c per 100 lbs. plus \$7.50 per car; plus war tax of 3% upon the transportation charge.

XI.

That between the 1st day of January, 1918, and the 25th day of June, 1918, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason Ehrman & Co. a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit A, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 23c per 100 lbs., together with a war tax of 3% thereon; that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the

route hereinabove specified, consigned to Mason Ehrman & Co. the number of car loads of sugar on the date and of the weight shown on the exhibit marked "Exhibit B, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 20c per 100 lbs. together with a war tax of 3% thereon; that between the 25th day of June, 1918, and the 31st day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason Ehrman & Co. a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit C, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax of 3% thereon; that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason Ehrman & Co. the number of car loads of sugar on the date and of the weight shown on the exhibit marked "Exhibit D, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon; that between the same dates there was shipped from Betteravia to Portland via the line of the Southern Pacific Company over the route hereinabove specified, con-

signed to Mason Ehrman & Company the number of car loads of sugar on the date and of the weight shown on the exhibit marked "Exhibit E, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges $31\frac{1}{2}c$ per 100 lbs. together with a war tax of 3% thereon; and that between December 31st, 1919, and February 29th, 1920, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason, Ehrman & Co. a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit F, Mason, Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs. together with a war tax of 3% thereon.

XII.

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Company a car load of sugar on the date and of the weight shown in the exhibit marked "Exhibit G, Wadhams & Co." attached hereto and made a part of this complaint, on which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax

of 3% thereon; and that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Company a car load of sugar on the date and of the weight shown in the exhibit marked "Exhibit H, Wadhams & Co." attached hereto and made a part of this complaint, on which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon.

XIII.

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Lang & Company, a car load of sugar on the date and of the weight shown in the exhibit marked "Exhibit I, Lang & Co." attached hereto and made a part of this complaint, on which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon.

XIV.

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Kerr Bros.

a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit J Wadhams & Kerr" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax of 3% thereon; and that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Kerr Bros. the number of car loads of sugar on the date and of the weight shown on the exhibit marked "Exhibit K, Wadhams & Kerr" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon.

XV.

That all of said charges were paid by the respective consignees on the exhibits attached, on the respective dates shown in the column marked "Date Paid"; that the over charges on each of said shipments are designated in the column marked "Overcharges"; that all of said charges were illegally exacted, and exacted contrary to the provisions of Section 4 of the act of Congress known as The Act to Regulate Commerce and amendments thereto, and the plaintiff's assignors were compelled to and did pay the same in order to secure delivery and possession of said shipments; that all of said charges above enumerated on the shipments listed

were paid by Mason Ehrman & Company, Wadhams & Company, Lang & Company and Wadhams & Kerr Bros. and that said firms have heretofore and for a valuable consideration sold, assigned and transferred to the plaintiff all of their right, title and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified; and that the defendant is indebted to the plaintiff in the full sum of said overcharges, to-wit, the sum of Six Thousand, Eight Hundred Eighty-two and 17/100 (\$6,882.17) Dollars, with interest at the rate of 6% per annum from the respective dates upon which said respective overcharges were exacted, and plaintiff has been damaged in the full sum of said overcharges and interest thereon.

XVI.

That the sum of Twelve Hundred (\$1200.00) Dollars is a reasonable sum to be allowed plaintiff as attorney's and counselor's fees herein.

WHEREFORE plaintiff prays for a judgment against the defendant in the sum of Six Thousand, Eight Hundred Eighty-two and 17/100 (\$6,882.17) Dollars, with interest on the respective overcharges from the date of payment thereof, and for the further sum of Twelve Hundred (\$1200.00) Dollars as attorney's and counselor's fees, and for his costs and disbursements incurred herein.

WILSON & GUTHRIE,

Attorneys for Plaintiff.

RECAPITULATION

Mason Ehrman, total overcharge.....	\$3,619.51
Wadhams & Co., total overcharge.....	99.26
Lang & Co., total overcharge.....	55.14
Wadhams & Kerr, total overcharge.....	3,108.26
<hr/>	
Total.....	\$6,882.17

EXHIBIT A—MASON EHRMAN

Date Paid	6/ 4/18.....	Overcharge \$	51.19
"	" 6/11/18.....	"	55.34
"	" 6/21/18.....	"	49.11
"	" 6/21/18.....	"	83.63
"	" 6/29/18.....	"	93.23
"	" 7/ 2/18.....	"	40.45
"	" 7/ 9/18.....	"	48.16
"	" 7/ 8/18.....	"	110.67
"	" 7/ 9/18.....	"	109.34
"	" 7/17/18.....	"	110.47
"	" 7/22/18.....	"	65.74
"	" 10/14/18.....	"	65.60
"	" 10/17/18.....	"	66.99
"	" 10/19/18.....	"	109.49
"	" 11/14/18.....	"	65.49
"	" 11/18/18.....	"	65.49
"	" 11/23/18.....	"	65.79
"	" 1/17/19.....	"	98.25
"	" 1/30/19.....	"	95.11
"	" 3/10/19.....	"	65.60
"	" 3/31/19.....	"	66.33

"	"	4/22/19.....	"	65.60
"	"	5/30/19.....	"	70.96
"	"	5/19/19.....	"	65.60
"	"	5/27/19.....	"	65.60
"	"	6/ 6/19.....	"	65.60

EXHIBIT C—MASON EHRMAN

Date Paid	6/19/19.....	Overcharge \$	65.60
"	6/26/19.....	"	65.60
"	6/27/19.....	"	77.67
"	7/ 7/19.....	"	65.60
"	7/14/19.....	"	65.60
"	7/16/19.....	"	65.60
"	7/22/19.....	"	42.06
"	7/28/19.....	"	77.82
"	7/31/19.....	"	42.04
"	8/28/19.....	"	75.07
"	8/29/19.....	"	39.37
"	9/ 5/19.....	"	40.17
"	10/22/19.....	"	66.16
"	11/12/19.....	"	66.35
"	11/21/19.....	"	66.26
"	11/22/19.....	"	39.54
"	11/26/19.....	"	39.49
"	11/25/19.....	"	65.79
"	12/16/19.....	"	72.79
"	7/ 8/18.....	"	44.81
"	7/ 8/18.....	"	58.60
"	7/22/18.....	"	41.35
"	2/18/19.....	"	34.90

"	"	3/27/19.....	"	41.36
"	"	4/11/19.....	"	41.36

EXHIBIT D—MASON EHRMAN

Date Paid	5/13/19.....	Overcharge \$	41.36
"	6/13/19.....	"	41.36
"	6/30/19.....	"	27.58
"	10/16/19.....	"	41.21
"	10/ 2/19.....	"	41.36
"	10/15/19.....	"	24.82
"	11/10/19.....	"	3.58
"	11/17/19.....	"	5.72
"	"	6.93
"	1/29/20.....	"	69.80

EXHIBIT G—WADHAMS & CO.

Date Paid	6/25/20.....	Overcharge \$	48.33
"	10/14/19.....	"	50.93
"	8/14/19.....	"	55.14

EXHIBIT J—WADHAMS & KERR

Date Paid	12/18/18.....	Overcharge \$	66.58
"	12/28/18.....	"	78.61
"	1/ 7/19.....	"	39.37
"	12/31/18.....	"	39.44
"	1/10/19.....	"	38.01
"	1/11/19.....	"	39.36
"	1/16/19.....	"	39.36
"	1/20/19.....	"	40.82

"	"	1/20/19.....	"	39.30
"	"	1/30/19.....	"	39.36
"	"	2/ 4/19.....	"	39.36
"	"	2/24/19.....	"	39.75
"	"	2/25/19.....	"	39.62
"	"	2/25/19.....	"	40.00
"	"	3/22/19.....	"	42.60
"	"	3/11/19.....	"	41.37
"	"	3/27/19.....	"	41.18
"	"	3/31/19.....	"	41.04
"	"	4/11/19.....	"	41.60
"	"	4/17/19.....	"	40.57
"	"	4/18/19.....	"	41.58
"	"	4/22/19.....	"	42.56
"	"	4/26/19.....	"	42.74
"	"	5/ 7/19.....	"	40.25
"	"	5/21/19.....	"	40.77
"	"	5/28/19.....	"	41.03
"	"	5/31/19.....	"	40.55
"	"	6/ 4/19.....	"	42.23
"	"	7/17/19.....	"	48.03
"	"	6/20/19.....	"	40.95
"	"	6/30/19.....	"	40.85

EXHIBIT J—WADHAMS & KERR

Date Paid	7/ 3/19.....	Overcharge \$	39.89
"	" 7/ 7/19.....	"	39.78
"	" 7/ 8/19.....	"	39.35
"	" 7/21/19.....	"	39.35
"	" 7/21/19.....	"	42.21

"	"	7/24/19.....	"	39.35
"	"	7/26/19.....	"	39.36
"	"	7/30/19.....	"	43.22
"	"	7/28/19.....	"	39.35
"	"	7/31/19.....	"	43.15
"	"	8/21/19.....	"	42.73
"	"	8/27/19.....	"	39.94
"	"	8/23/19.....	"	42.34
"	"	8/29/19.....	"	43.25
"	"	9/ 5/19.....	"	46.47
"	"	10/ 3/19.....	"	44.23
"	"	11/13/19.....	"	68.04
"	"	11/24/19.....	"	71.38
"	"	12/19/18.....	"	41.43
"	"	12/30/18.....	"	25.25
"	"	12/31/18.....	"	25.05
"	"	1/ 7/19.....	"	28.99
"	"	1/ 7/19.....	"	27.84
"	"	1/11/19.....	"	25.57
"	"	1/16/19.....	"	24.95
"	"	1/18/19.....	"	25.19
"	"	1/18/19.....	"	29.83
"	"	1/22/19.....	"	25.02

EXHIBIT K—WADHAMS & KERR

Date Paid	1/22/19.....	Overcharge	\$ 44.17
"	2/ 5/19.....	"	24.77
"	2/19/19.....	"	25.08
"	3/ 4/19.....	"	24.92
"	3/11/19.....	"	25.15
"	3/15/19.....	"	24.96

"	"	5/13/19.....	"	24.82
"	"	5/24/19.....	"	25.28
"	"	6/ 3/19.....	"	25.13
"	"	5/31/19.....	"	25.34
"	"	7/19/19.....	"	25.13
"	"	7/25/19.....	"	25.13
"	"	7/ 3/19.....	"	24.82
"	"	7/ 9/19.....	"	25.13
"	"	7/11/19.....	"	24.82
"	"	7/24/19.....	"	24.77
"	"	7/26/19.....	"	24.82
"	"	8/ 5/19.....	"	24.82
"	"	8/16/19.....	"	25.12
"	"	9/ 8/19.....	"	25.63
"	"	9/22/19.....	"	26.93
"	"	10/ 4/19.....	"	48.64
"	"	10/25/19.....	"	32.55
"	"	10/24/19.....	"	27.59
"	"	10/23/19.....	"	41.39

On the 28th day of February, 1922, there was filed the following

AMENDED STIPULATION AMENDING COMPLAINT

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys as follows:

I.

That the stipulation heretofore entered into between

the parties hereto by their respective attorneys amending the complaint in the above entitled action may be amended to read as follows, and that the exhibits attached to said stipulation amending the complaint may be considered a part of and attached to this amended stipulation:

I.

That Paragraph XIV of plaintiff's complaint be deemed to be amended by adding to line 7, page 10, after the words "Exhibit J, Wadhams & Kerr, attached hereto," the words "and Supplemental Exhibit J attached to the stipulation amending complaint."

II.

That said complaint may be amended by adding a paragraph after Paragraph XIV to be designated as Paragraph XIV-a as follows:

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Allen & Lewis the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit L" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c

per 100 lbs., together with a war tax of 3% thereon; that between the same dates there was shipped from San Francisco to Portland, Oregon, via the line of the defendant company over the route hereinabove specified, consigned to Allen & Lewis, the number of car loads of sugar on the dates and of the weight shown in the exhibit marked "Supplemental Exhibit M" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges the sum of 25c per 100 lbs., together with a war tax of 3% thereon; and that between the 31st day of December, 1919, and February 29th, 1920, there were shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Allen & Lewis, the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit N" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax of 3% thereon.

III.

That said complaint may be amended by adding a paragraph thereto to be known as XIV-b, as follows:

That between the 25th day of June, 1918, and the 31st day of December, 1919, there was shipped from San Francisco to Portland, Oregon, via the line of the Southern Pacific Company, over the route hereinabove

specified, consigned to Carr & Preston Co., the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit O" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges 25c per 100 lbs., together with a war tax of 3% thereon.

IV.

That the complaint may be amended by adding a paragraph thereto, to be known as XIV-c as follows:

That between the 29th day of December, 1917, and the 24th day of June, 1918, there were shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company, over the route hereinabove specified, consigned to Meier & Frank Company, one car load of sugar on the date and of the weight shown in the exhibit marked "Supplemental Exhibit X," attached to this amended stipulation amending the complaint, and made a part of this complaint, on which defendant received and collected as transportation charge 23c per 100 lbs., together with war tax of 3% thereon; and that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, to Meier & Frank Company, one car load of sugar on the date and of the weight shown in the exhibit marked "Supplemental Ex-

hibit Y," attached to this amended stipulation amending complaint, and made a part of this complaint, on which defendant received and collected as transportation charge 29c per 100 lbs., together with a war tax of 3% thereon.

V.

That said complaint may be amended by adding a paragraph thereto, to be known as XIV-d, as follows:

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco, California, to East Portland, Oregon, via the line of the Southern Pacific Company, over the route hereinabove specified, consigned to Starr Fruit Products Company, the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit Z," attached to this amended stipulation amending the complaint, and made a part of this complaint, on all of which defendant received and collected as transportation charge 20c per 100 lbs., together with a war tax of 3% thereon; and that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco, California, to East Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Starr Fruit Products Company, the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit Z-a" attached to this amended stipulation amending complaint, and made a

part of this complaint, on all of which defendant received and collected as transportation charge 25c per 100 lbs., together with a war tax of 3% thereon.

VI.

That Paragraph XV may be deemed amended by adding to the end of the line 30, page 10, of said complaint, the names, Allen & Lewis, Carr & Preston Co., Tru Blu Biscuit Company, Meier & Frank Company, and Starr Fruit Products Company, and by amending the amount in line 7, page 11, to read Seven Thousand, Eight Hundred Six & 5/100 (\$7,806.05) Dollars, and by changing the amount in the prayer to read Seven Thousand, Eight Hundred Six & 5/100 (\$7,806.05) Dollars.

IT IS FURTHER STIPULATED that the answer to plaintiff's complaint be deemed amended to contain a denial of all of the amended matter contained in the stipulation amending complaint.

JAMES G. WILSON,
of Attorneys for Plaintiff.

BEN E. DEY,
Attorney for Defendant.

SUPPLEMENTAL EXHIBIT "J"

Date Paid	7/21/19.....	Overcharge \$	48.70
" "	6/17/19.....	"	39.35

SUPPLEMENTAL EXHIBIT "L"

Date Paid	1/20/19.....	Overcharge \$	39.29
"	" 1/30/19.....	"	43.26

SUPPLEMENTAL EXHIBIT "M"

Date Paid	1/30/19.....	Overcharge \$	24.82
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SUPPLEMENTAL EXHIBIT "N"

Date Paid	1/31/20.....	Overcharge \$	67.89
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SUPPLEMENTAL EXHIBIT "O"

Date Paid	10/16/19.....	Overcharge \$	31.96
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SUPPLEMENTAL EXHIBIT "P"

Date Paid	11/19/19.....	Overcharge \$	73.90
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SUPPLEMENTAL EXHIBIT "Q"

Date Paid	3/ 6/19.....	Overcharge \$	31.02
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RECAPITULATION

Wadhams & Kerr	\$ 88.05
Allen & Lewis	175.26
Carr & Preston	31.96
Tru Blu	104.92
Total	<hr/> \$400.19

SUPPLEMENTAL EXHIBIT X

Date Paid	6/20/18.....	Overcharge \$	52.72
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SUPPLEMENTAL EXHIBIT Y

Date Paid	7/29/18.....	Overcharge \$	77.66
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SUPPLEMENTAL EXHIBIT Z

Date Paid	5/23/18.....	Overcharge \$	31.99
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"	"	5/17/18.....	"	31.99
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"	"	5/22/18.....	"	31.99
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"	"	5/17/18.....	"	31.99
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SUPPLEMENTAL EXHIBIT Z-a

Date Paid	10/ 7/18.....	Overcharge \$	24.57
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"	"	9/28/18.....	"	20.67
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"	"	8/ 1/19.....	"	41.34
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"	"	8/ 9/19.....	"	48.25
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"	"	8/ 9/19.....	"	41.34
---	---	--------------	---	-------

"	"	8/12/19.....	"	41.34
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"	"	10/17/19.....	"	47.84
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On September 30, 1922, there was filed to said complaint as amended the following

DEMURRER TO AMENDED COMPLAINT

Comes now the above named defendant and demurs to the amended complaint on file herein on the following grounds:

I.

That this court has no jurisdiction of the subject matter of the action.

II.

That the amended complaint does not state facts sufficient to constitute a cause of action.

In presenting the first ground of the demurrer, this defendant will rely upon the theory that the Interstate Commerce Commission has exclusive original jurisdiction of actions of this character.

In presenting the second ground of the demurrer, this defendant will rely upon the facts that the amended complaint fails to allege facts from which it can be made to appear that the plaintiff has suffered any damages whatsoever, and the further facts that it affirmatively appears on the face of said amended complaint that plaintiff was not the original owner of said alleged choses in action, but on the contrary brings action upon the same as the assignee of the original owners thereof, and that said amended complaint fails to allege that the warrant for the payment of said alleged choses in action had been issued at or prior to the time of execution of said alleged assignments, and further fails to allege that said assignments were executed with the formalities required by Section 3477 of the Revised Statutes of the United States, and that therefore said alleged assignments are made null and void by the provisions of said Section 3477 of the Revised Statutes of the United States, and the further fact that the Director General of Railroads was not at any time mentioned in the amended complaint, and is not now amenable to the

short and long haul provision of the fourth section of the act to regulate commerce, as amended.

A. M. BULL,
PAUL P. FARRENS,

Attorneys for Defendant.

STATE OF OREGON,
COUNTY OF MULTNOMAH—ss.

I, PAUL P. FARRENS, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law.

PAUL P. FARRENS.

And afterwards, on the 2d day of January, 1923, there was rendered on said demurrer, by Honorable Charles E. Wolverton, Judge of said Court, the following

OPINION:

The plaintiff is endeavoring to recover upon assigned claims for rebate for alleged overcharges, above the tariff rates for carrying freight.

The sole question presented for decision is whether the assignee of such claims may be permitted to sue thereon, in view of Section 3477, U. S. Revised Statutes. This statute renders all transfers and assignments of any claim upon the United States null and void, unless they are freely made and executed in a manner prescribed, after the allowance thereof the ascertain-

ment of the amount due, and the issuance of a warrant for the payment of the same.

Plaintiff's counsel contend that this statute is inapplicable, because of the provisions of Section 10 of the Federal Control Act (40 Stat. 451, 456), which are, so far as pertinent:

“That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.”

I am impressed that the question has been disposed of by the holding of the court, in *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 559, that, the plain purpose of the provision being to preserve to the general public the rights and remedies against carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of federal operation:

“The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. * * * The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed.”

I am unable to agree with counsel for defendant in the view that the contention here presented is in no wise based upon the ground that the Director General is an instrumentality of the Government. The action stands as though it were brought against the Government, the Federal Control agent standing in its stead, and the intendment of the act is to extend to suitors all the rights and privileges to which they were entitled previous to the adoption of the Federal Control Act, save as restricted by the needs of the Government for war purposes. If the claimant could sue then upon an assigned claim without having observed the injunctions of Section 3477 in procuring the assignment, he may sue now, notwithstanding the Government is in effect the party sued. The section is therefore inapplicable, defensively considered.

Demurrer overruled.

And thereafter on said 2nd day of January, 1923, there was made and entered the following

ORDER.

This cause was heard by the Court upon the demurrer to the complaint as amended and was argued by Mr. James G. Wilson, of counsel for the plaintiff, and by Mr. Paul P. Farrens, of counsel for the defendant; On Consideration whereof,

IT IS ORDERED AND ADJUDGED that said demurrer be, and the same is hereby, overruled.

And thereafter on the 19th day of January, 1923, there was served and filed the following

ANSWER.

Comes now the defendant above named and for answer to plaintiff's amended complaint, admits, denies and alleges as follows:

I.

Admits each and every allegation contained in paragraph I.

II.

Denies each and every allegation contained in paragraph II of said amended complaint, except defendant admits that Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is and was at all times mentioned in plaintiff's amended complaint the owner

of a line of railroad extending from points in California, in said amended complaint mentioned, to the easterly bank of the Willamette River, in Portland, Oregon, and further admits that the Oregon-Washington Railroad & Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, is the owner of a line of railroad extending from St. Johns to the easterly bank of the Willamette River, in Portland, Oregon.

III.

Admits each and every allegation contained in paragraph III except that defendant denies that either the Southern Pacific Company or the Oregon-Washington Railroad & Navigation Company own lines of railroad which reach the station known as Portland.

IV.

Admits each and every allegation contained in paragraph IV of said amended complaint except that the defendant denies that either the Oregon-Washington Railroad & Navigation Company or the Southern Pacific Company own a line or lines of railroad extending to the station of Portland, State of Oregon.

V.

Admits each and every allegation contained in para-

graph V of said amended complaint except that defendant denies that it ever published and filed tariffs establishing a rate on sugar in carload lots, to be applied on transportation of sugar from points in California, named in paragraph III of plaintiff's amended complaint, to the station of Portland, to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond the station of Portland, and further denies that the tariff and supplements referred to in paragraph V of plaintiff's amended complaint, provided that rates from said originating points in California to points on the line of Oregon-Washington Railroad & Navigation Company should be made by adding the said proportional rates so established to the local rate from the station of Portland, established by Oregon-Washington Railroad & Navigation Company from said station of Portland to stations on the Oregon-Washington Railroad & Navigation Company's line.

VI.

Denies each and every allegation contained in paragraph VI of said amended complaint.

VII.

Denies each and every allegation contained in paragraph VII of said amended complaint except that defendant admits that upon the commencement of federal control of railroads the President of the United States

initiated rates, fares, charges, classifications, regulations and practices in the manner prescribed by law, and thereafter in like manner initiated all changes in rates, fares, charges, classifications, regulations and practices that became effective during the period of federal control of railroads.

VIII.

Denies each and every allegation contained in paragraph VIII of said amended complaint.

IX.

Admits each and every allegation contained in paragraph IX of said amended complaint.

X.

Denies each and every allegation contained in paragraphs X, XI, XII, XIII, XIV, XIV-a, XIV-b, XIV-c, XIV-d and XV.

XI.

Denies that the sum of \$1200 or any other sum or sums of money whatsoever is a reasonable sum to be allowed plaintiff as attorney's and counsellor's fees herein.

And for a further, separate and affirmative answer and defense to plaintiff's amended complaint, defendant alleges:

I.

That from and after twelve o'clock noon on December 28, 1917, to midnight of February 29, 1920, which period will hereinafter be designated as the period of federal control, the President of the United States, acting by and through the Director General of Railroads, United States Railroad Administration, was in control of the lines of railroad of Southern Pacific Company and of the Northern Pacific Terminal Company, and of the line of railroad extending upon and across that certain railroad bridge over the Willamette River at a location near the Union Station, in the City of Portland, Oregon.

II.

That during the period of federal control the President of the United States, acting by and through the Director General of Railroads, United States Railroad Administration, in the manner prescribed by law initiated all tariffs, rates, fares, charges, classifications, regulations and practices applicable to the shipment of sugar in carload lots from San Francisco, Marysville, Hamilton, Crockett and other points designated in plaintiff's amended complaint as "Group 1 Points," Alvarado, Salinas, Visalia and Betteravia, in California, to the station of Portland, in Oregon, by filing the same

with the Interstate Commerce Commission, and that all charges collected by the United States Railroad Administration for the transportation of sugar in carload lots between said points were based upon and authorized by said tariffs and rates.

III.

That among other orders issued by the President of the United States, acting by and through the Director General of Railroads, United States Railroad Administration, was an order issued May 25, 1918, at Washington, D. C., commonly known as "General Order No. 28," which said order of the President of the United States initiated tariffs, rates, fares, charges, classifications, regulations and practices to be effective June 25, 1918; that said tariffs, rates, fares, charges, classifications, regulations and practices were duly filed with the Interstate Commerce Commission, and that from and including June 25, 1918, until the termination of federal control of railroads, said tariffs, rates, fares, charges, classifications, regulations and practices constituted the only tariffs, fares, charges, classifications, regulations and practices lawfully applicable to the transportation of sugar in carload lots from points of origin herein mentioned to the station of Portland in the City of Portland.

IV.

That on May 27, 1918, the Interstate Commerce Commission issued its Fourth Section Order No. 7316, in words and figures as follows:

"Fourth Section Order No. 7316. General No. 17. At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of May, A. D. 1918.

"WHEREAS, The President of the United States through the Director General, United States Railroad Administration, has initiated and prescribed rates, fares, charges, and classifications to be applied on all traffic carried by railroad and steamship lines under federal control, except traffic carried entirely by water to and from foreign countries, as set forth in General Order No. 28, dated May 25, 1918, of said Director General;

"And WHEREAS, the said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediate provision of Section 4 of the act to regulate commerce as will permit said carriers under federal control to file schedules containing rates, fares, charges, or classifications containing departures from the aforesaid provisions of Section 4, enabling carriers under federal control, in the present emergency, to secure increased revenues to be derived from increases in rates, fares, charges and classifications initiated and prescribed by said General Order No. 28 of May 25, 1918;

"It is ordered, that in those instances in which carriers under federal control are required by General Order No. 28 of the Director General, United

States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under federal control, higher rates, fares, charges and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges and classifications which exceed the aggregate of the intermediate rates, fares, charges and classifications, as set forth in General Order No. 28 of the Director General, the said carriers be, and they are hereby, authorized to establish such rates, fares, charges and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the Fourth Section of the Act to regulate commerce.

“And it is further ordered, that carriers not under federal control maintaining joint rates, fares, charges, and classifications with carriers under federal control may establish such joint rates, fares, charges and classifications as are necessary to comply with the terms of the said General Order No. 28 of the Director General, without observing the provisions of the Fourth Section of the Act to regulate commerce.

“It is further ordered, that this order shall supersede and take the place of any provision or provisions of any Fourth Section order or orders heretofore issued that may be in conflict herewith.

"The Commission does not hereby approve any rates, fares, charges, and classifications that may be filed under this permission, all such rates, fares, charges and classifications being subject to complaint, investigation, and correction if in conflict with any provisions of the act.

By the commission:

(SEAL)

George B. McGinty,
Secretary."

That said Fourth Section Order No. 7316 was in full force and effect from and including June 27, 1918, to and including the 29th day of February, 1920.

WHEREFORE, having fully answered plaintiff's amended complaint, defendant prays that the same be dismissed and that it have and recover of and from plaintiff its costs and disbursements herein, and such sum as the court shall find and determine to be a reasonable attorney's fee herein.

A. M. BULL,
PAUL P. FARRENS,
Attorneys for Defendant.

And thereafter on the 20th day of January, 1923, there was duly filed in said Court the following

DEMURRER TO ANSWER

Comes now the plaintiff above named and demurs to the further, separate and affirmative answer and de-

fense of plaintiff's amended complaint contained in the answer of said defendant on the ground and for the reason that said further, separate and affirmative answer does not state facts sufficient to constitute a defense to plaintiff's complaint.

JAMES G. WILSON
GEO. B. GUTHRIE,
Attorneys for Plaintiff.

I, JAMES G. WILSON, one of the attorneys for plaintiff in the above entitled action, hereby certify that the foregoing demurrer is in my opinion well founded in law.

JAMES G. WILSON.

On the argument of said demurrer, said plaintiff will rely upon the following points, to-wit:

I.

That it is nowhere alleged in said answer that the defendant or its predecessors, the Southern Pacific Company, or any agent or carrier, made any application to the Interstate Commerce Commission for permission to charge more for the transportation from the originating points alleged in plaintiff's complaint to Portland, than said carriers were permitted to charge for the transportation over said lines in connection with the Oregon-Washington Railroad & Navigation Company to St. Johns. That no hearing was had with reference

to said violation of the Interstate Commerce Act, and no order made permitting the same.

II.

That it is nowhere alleged in said complaint that as a basis for the said purported order of the Interstate Commerce Commission that any application or hearing was had with reference to the violation of the 4th Section of the Interstate Commerce Act involved in this procedure; that the 4th Section of the Act to regulate commerce provides that the Interstate Commerce Commission may permit charging a greater sum for a lesser haul over the same line or route only in special cases, after application and a hearing before the Commission thereon; that no such application or hearing was had with reference to the violation involved in this case, and that no general order of the Commission of the nature set out in said affirmative answer was made to legalize any violation not specifically covered in the application and not considered by the Commission.

United States v. Merchants Association, 242
U. S. 187.

Davis v. Parrington, 281 Fed. 10, 16.

JAMES G. WILSON,
GEO. B. GUTHRIE,
Attorneys for Plaintiff.

And thereafter, to-wit: on the 5th day of February, 1923, there was rendered on said demurrer to answer

by Honorable R. S. Bean, Judge of said Court, the following

OPINION

I do not understand that the Federal Control Act (40 St. 456) gave the President power and authority to initiate rates in violation of Section 4 of the Interstate Commerce Act (36 St. 547) without the approval of the Interstate Commerce Commission (Parrington vs. Davis, this court, April 4, 1921) nor that the Commission can, by a general order, suspend the operation of such section, "but only acting separately in respect to particular carriers and only after consideration of the special circumstances existing." (U. S. vs. Merchants, etc., Assn., 242 U. S. 178-187.)

Demurrer sustained.

And thereafter on said 5th day of February, 1923, there was made and entered the following

ORDER SUSTAINING DEMURRER

This cause was heard by the court upon the demurrer of plaintiff to the further and separate defense herein, plaintiff appearing by Mr. James G. Wilson, of counsel, and defendant by Mr. Paul P. Farrens, of counsel. Upon Consideration Whereof

IT IS ORDERED that said demurrer be and the same is hereby sustained.

Thereafter on the 29th day of May, 1923, there was duly filed the following

NOTICE.

*To A. J. Parrington, Plaintiff above named, and to
Messrs. Wilson & Guthrie, his Attorneys:*

You are hereby notified that upon the re-argument of the points of law involved in the above entitled case to be presented pursuant to agreement of counsel and consent of the court, defendant will urge in support of the second ground of his demurrer to the amended complaint (which said second ground was to the effect that the amended complaint does not state facts sufficient to constitute a cause of action) that all claims set forth in said amended complaint, which accrued more than two years prior to the date of the filing of said complaint, are barred by the Statute of Limitation set forth in Section 16 of the Act to Regulate Commerce, as amended, and as construed by the United States Supreme Court in the cases of Phillips vs. Grand Trunk Western Railway Company, 236 U. S. 662, 667, and Kansas City Southern Ry. Co. vs. Wolfe, decided by the United States Supreme Court February 19, 1923. The foregoing contention, based on said Statute of Limitation, will be urged in addition to the other points specifically mentioned in said demurrer to said amended complaint as relied upon in support of the said second ground of said demurrer.

A. M. BULL,
PAUL P. FARRENS,
Attorneys for Defendant.

And thereafter said cause came on for trial before Honorable R. S. Bean, District Judge, on the 1st, 4th and 5th days of June, 1923, and the Court having taken said cause under advisement did thereafter on the 19th day of July, 1923, make and file in said Court the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for trial on the 1st day of June, 1923, and evidence having been introduced in behalf of both parties, and arguments had on June first, fourth and fifth, 1923, before the Court without a jury, a jury having been waived by both parties by stipulation in writing filed herein, the plaintiff appearing by James G. Wilson, his attorney, and the defendant appearing by Paul P. Farrens and A. M. Bull, of his attorneys, and the Court having taken the matter under advisement until this time, and being fully advised, does now make the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT

I.

That the Southern Pacific Company is and was during all times mentioned in plaintiff's complaint, the owner of a line of railroad extending from the originating points mentioned in plaintiff's complaint to East Portland in the State of Oregon, and is and was the

owner of a one-half interest in the railroad bridge extending from East Portland to Portland, Oregon, and is a joint lessee of the tracks and facilities of the Northern Pacific Terminal Company of Oregon in Portland, Oregon, has full rights of operating trains over said bridge and over the facilities and tracks of the Northern Pacific Terminal Company of Oregon, and has full rights to operate a line of railroad extending from said points of origin to all points reached by the tracks of the Northern Pacific Terminal Company of Oregon in the City of Portland, Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company at all times mentioned in the complaint was a joint lessee of the tracks and facilities of the Northern Pacific Terminal Company of Oregon, with operating rights thereover in the City of Portland, Oregon, was the owner of a one-half interest in the bridge across the Willamette River from Portland to East Portland, Oregon, with full operating rights thereover, and was the owner of a line of railroad from East Portland to St. Johns in the State of Oregon, and had full operating rights from all points reached by the Northern Pacific Terminal Company of Oregon's tracks in the City of Portland to St. Johns, Oregon.

III.

That the stations known as Portland, East Portland and St. Johns, are all within the State of Oregon and

within the corporate limits of the City of Portland, Oregon.

IV.

That from and after twelve o'clock noon of December 28th, 1917, to midnight, February, 1920, which period was known as the period of Federal Control, the United States Railroad Administration was in control of the lines of railroad of the Southern Pacific Company extending from the points of origin designated in the complaint in California, to Portland, Oregon, including the operating rights of said Southern Pacific Company over the bridge across the Willamette River between East Portland and Portland, and the rights over the terminal facilities and tracks of the Northern Pacific Terminal Company of Oregon, and was likewise during said period in possession and control of the line of railroad of the Oregon-Washington Railroad & Navigation Company between the stations of Portland and St. Johns, including the rights of said company over the tracks and facilities of the Northern Pacific Terminal Company of Oregon and across said Willamette River bridge between Portland and East Portland, and also operating said lines in interstate commerce as a common carrier under authority of the United States and the Director General of Railroads, and pursuant to tariffs, rules and regulations for such purpose adopted and provided.

V.

That at the stations of East Portland, Oregon, and Portland, Oregon, the line of railroad of the Southern

Pacific Company connects with the line of railroad of the Oregon-Washington Railroad & Navigation Company, and that prior to the period of Federal Control the Southern Pacific Company published and filed with the Interstate Commerce Commission rates on sugar in carload lots of the minimum weight of 44,000 pounds to be applied on the transportation of sugar from San Francisco, Marysville, Hamilton, Crockett and other points designated in the tariff as Group 1 points, Alvarado, Salinas, Visalia and Betteravia to the stations of Portland and East Portland to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond Portland and East Portland, and that said rates so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1 points, were 13 cents per 100 pounds; from Salinas and Visalia, $20\frac{1}{2}$ cents per 100 pounds; and from Betteravia, 23 cents per 100 pounds; and that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate so established to the local rate from Portland or East Portland established by the Oregon-Washington Railroad & Navigation Company from Portland or East Portland to point of destination, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's Tariff No. 6-B, I. C. C. 283, effective March 15th, 1914, and amendments and reissues thereof; that in

and by Supplement No. 57 of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1B, I. C. C. 110, effective June 25th, 1918, which was published and filed with the Interstate Commerce Commission, said proportional rate from said points in California to Portland and East Portland was increased so that the rate from and after the 25th day of June, 1918, became 16½ cents per 100 pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado and Group 1 points to Portland and East Portland; 25½ cents per 100 pounds from Salinas and Visalia to Portland and East Portland; and 29 cents per 100 pounds from Betteravia to Portland and East Portland, which said rate was continued in effect by said supplement and re-issues of said tariff up to and subsequent to the termination of Federal Control.

VI.

That the Oregon-Washington Railroad & Navigation Company published and filed with the Interstate Commerce Commission its Local Tariff No. 6-B, I. C. C. No. 283, effective March 15th, 1914, wherein, by Item 70, it established and put in effect the rate from its stations of Portland and East Portland to its station of St. Johns in the State of Oregon of 37½ cents per ton of 2,000 pounds, with a minimum charge of \$7.50 per car, which rate applied on sugar in carload lots; that said rate was continued in effect by said tariff and supplements and re-issues thereof up to and including the 30th day of December, 1919; that thereafter, in and

by Supplement No. 23 of Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. No. 312, Item 60-G published and filed with the Interstate Commerce Commission, and made effective December 31st, 1919, the said carrier established a rate from its station of Portland to its station of St. Johns of \$7.50 per car, which had reference to note reading as follows:

“Applies only on freight interchanged with water carriers at St. Johns, Or., and when delivered to or received from railroad connections of O.-W. R. & N. at East Portland, Or., or Portland, Ore., in line haul movement. Will not apply on carload freight originating at or destined to points reached via O.-W. R. & N. Lines and its Connections where line haul can be performed by O.-W. R. & N. Lines.”

That said tariff also continued in effect the rate of 37½ cents per 100 pounds between Portland, Oregon, and St. Johns, Oregon, without restriction, which said tariff continued in effect during the period of Federal Control; the Court finds that the item providing for \$7.50 per car applied on shipments of sugar over the lines in question from points of origin to St. Johns, Oregon.

VII.

That the United States Railroad Administration adopted and continued in effect the rates of the South-

ern Pacific Company and the Oregon-Washington Railroad & Navigation Company established before the period of Federal Control, and in effect at the time of the inception of said Federal Control, and joined in and were parties to the said rates established during said control.

VIII.

That the station of St. Johns is more distant from San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas and Betteravia over the line of the Southern Pacific and the Oregon-Washington Railroad & Navigation Company by the route over which said rates were established as hereinbefore found than the station of Portland, Oregon, or the station of East Portland, Oregon, and the haul over said route between said points of origin in California to Portland in the State of Oregon is included within the haul over said route from said point of origin in California to St. Johns in the State of Oregon, and is in the same direction and over the same line or route, and the haul to Portland and to East Portland in the State of Oregon over said route is included within the haul from said point of origin in California to St. Johns in the State of Oregon, and on all shipments over said route from Crockett, Port Costa, (a point in Group 1), Alvarado and Salinas, from January 1st, 1918, to and inclusive of June 24th, 1918, the United States Railroad Administration charged and collected the sum of 23 cents per 100 pounds on sugar in carload lots; and from San

Francisco to Portland charged and collected the sum of 20 cents per 100 pounds; and from Betteravia and Hamilton the sum of 25 cents per 100 pounds; and from Visalia the sum of $27\frac{1}{2}$ cents per 100 pounds; and in addition thereto collected thereon War Tax at the rate of three per cent. of the transportation charge; and on all shipments between and inclusive of June 25th, 1918, and the end of Federal Control said Railroad Administration charged and collected on said shipments in carload lots from Crockett, Port Costa, Alvarado and Salinas the sum of 29 cents per 100 pounds; from San Francisco 25 cents per 100 pounds; from Betteravia and Hamilton $31\frac{1}{2}$ cents per 100 pounds; together with a War Tax of three per cent. on the transportation charge.

IX.

That said charges were to the extent that the same exceeded the rate established and in effect from the various points in California to the station of St. Johns in the State of Oregon at the same time illegal and unlawful and charged without authority of law, and the exaction of the War Tax on the excess of such charges of said rates from said respective points in California to St. Johns was illegal and unlawful and exacted without authority of law and in violation of Section 4 of the Act of Congress known as the Act to Regulate Commerce and amendments thereto, and that the only lawful rate in effect from January 1st, 1918, to and inclusive of June 24th, 1918, was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, $14\frac{7}{8}$ cents per 100 pounds; from Betteravia, $24\frac{7}{8}$ cents per 100 pounds, and from Visalia and Salinas, $22\frac{3}{8}$ cents per 100 pounds; plus a War Tax of three per cent. upon the transportation charge; and that the only lawful rate to Portland or East Portland from June 25th, 1918, to and inclusive of December 30th, 1919, from the various points in California was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, $18\frac{3}{8}$ cents per 100 pounds; from Betteravia, $30\frac{7}{8}$ cents per 100 pounds, and from Visalia and Salinas, $27\frac{3}{8}$ cents per 100 pounds; plus a War Tax of three per cent. upon the transportation charge; and that the only lawful rate in effect to Portland or East Portland from said various points in California between the 31st day of December, 1919, and the end of Federal Control was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, $16\frac{1}{2}$ cents per 100 pounds, plus \$7.50 per car; from Betteravia, 29 cents per 100 pounds, plus \$7.50 per car; and from Visalia and Salinas, $25\frac{1}{2}$ cents per 100 pounds, plus \$7.50 per car; plus a War Tax of three per cent. upon the transportation charge.

X.

That the plaintiff's assignors shipped over the lines of the Southern Pacific from the points of origin shown,

the shipments listed in the exhibits attached to the complaint and the stipulations amending the complaint filed in this cause, and paid to the United States Railroad Administration for such transportation, including War Tax, the amount shown in the column headed "Freight, incl. war tax if any"; and the said United States Railroad Administration charged and collected the freight at the rate shown in the column headed "Rate", and the aggregate amount shown in the column headed "Freight, Inc. War Tax if any"; that said collections were made on the dates shown in the column headed "Date Paid", and said shipments were made consigned to the persons shown at the head of each of said exhibits, and the freight was paid by such persons, and that each and all of said persons shown as consignees in said various exhibits paid to the United States Railroad Administration the freight charges on said various shipments shown in said column headed "Freight Incl. War Tax if any"; and that each and all of said consignees did, prior to the filing of said complaint and the stipulations amending said complaint, sell, transfer and assign to the plaintiff their claims for the exaction by the United States Railroad Administration for the transportation of said shipments, and the plaintiff is now the lawful owner and holder thereof; that the amount of said unlawful exaction over and above the legal rate on the shipments so made, is the sum of Seven Thousand, Eight Hundred, Six Dollars and Five Cents (\$7,806.05).

XI.

That the Court finds that a reasonable attorney's

fee in this Court for the collection of said claims is the sum of Seven Hundred and Fifty Dollars (\$750.00); said attorney's fee to cover only the work with reference to collection in this Court and not on any appeal therefrom.

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload lots from the various points of origin in California to Portland and East Portland were illegal and in violation of the amended 4th Section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from said various originating points to St. Johns in the State of Oregon at the time of the movement of said respective shipments.

II.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between the said originating points and St. Johns at the time the respective shipments moved.

III.

That the plaintiff is entitled to judgment against

the defendant for the sum of Seven Thousand, Eight Hundred, Six Dollars and Five Cents (\$7,806.05), together with interest at the rate of six (6) per cent. per annum from June 1st, 1919, together with the sum of Seven Hundred and Fifty Dollars (\$750.00) attorney's fees, and plaintiff's costs and disbursements incurred herein.

July 19, 1923.

R. S. BEAN,
Judge.

And afterward on said 19th day of July, 1923, there was made, entered and filed in said Court and cause the following:

JUDGMENT.

This matter coming on on application of the plaintiff for entry of judgment in the above entitled cause, plaintiff appearing by his attorney, James G. Wilson, and the defendant appearing by Paul P. Farrens and A. M. Bull, of its attorneys, and the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the plaintiff A. J. Parrington have and recover of and from the defendant James C. Davis, Agent United States Railroad Administration, judgment in the sum of Seven Thousand, Eight Hundred, Six Dollars and Five Cents (\$7,806.05), together with interest at the rate of six (6)

per cent per annum from the first day of June, A. D. 1919, and the sum of Seven Hundred and Fifty Dollars (\$750.00) allowed as attorney's fees in this Court, and the plaintiff's further costs and disbursements herein taxed and allowed in the sum of Dollars.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant pay said sum promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open Court this 19th day of July, A. D. 1923.

R. S. BEAN, Judge.

That thereafter, on said 19th day of July, 1923, there was made and entered the following

ORDER.

Pursuant to the stipulation of the parties hereto, IT IS HEREBY ORDERED AND ADJUDGED that defendant may have to and including September 15th, 1923, within which to serve and tender his bill of exceptions herein.

R. S. BEAN, Judge.

That thereafter, prior to the 15th day of September, 1923, there was served, tendered and lodged with the clerk of said Court, a Bill of Exceptions, and thereafter, on October 18, 1923, the Court settled, allowed and approved the following

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the foregoing cause came on to be heard on the 29th day of May, 1923, before the Honorable R. S. Bean, Judge of the above entitled court, plaintiff appearing by James G. Wilson, defendant appearing by A. M. Bull and Paul P. Farrens, respectively the attorneys, and jury by a stipulation in writing filed in this court was waived and said cause tried to the court.

Whereupon the following proceedings were had:

**TESTIMONY OF A. J. PARRINGTON ON HIS
OWN BEHALF.**

A. J. PARRINGTON, plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WILSON.

I reside at Portland, Oregon. My business is that of shippers' traffic agent. Practically all my business life has been spent in the transportation line. The last years of my railroad experience was in the traffic department of the Oregon-Washington Railroad & Navigation Company. Since then I have been acting in my present capacity.

San Francisco, Marysville, Hamilton, Crockett, Alvarado, Salinas, and Visalia are points in California and are located on the lines of Southern Pacific Company. Betteravia is located on the line of the Santa

Maria Valley Railway in California. Portland and East Portland are the northern termini of the Southern Pacific lines north from California. St. Johns, Oregon, is located on the line of the Oregon-Washington Railroad & Navigation Company directly north of East Portland. Portland, East Portland and St. Johns are railroad stations within the corporate limits of the City of Portland, Oregon. This is an industrial map of Portland, Oregon, issued by the Port of Portland, showing the principal facilities, industries and rail lines. I am marking with a letter "a" the station on the Southern Pacific lines known as East Portland, with a letter "b" the station known as Portland, and with a letter "c" the station known as St. Johns.

(This map was admitted in evidence and marked plaintiff's Exhibit 1, and is attached to this bill of exceptions and made a part hereof.)

This is a map showing Southern Pacific Company's lines in the State of Oregon.

(This map was received in evidence and marked plaintiff's Exhibit 2, and is attached to this bill of exceptions and made a part hereof.)

Sugar from any of the points mentioned in the State of California, destined to St. Johns, would move north-erly over the lines of Southern Pacific Company to East Portland, and there be delivered to the O.-W. R. & N. for movement to St. Johns. It could move into Portland station but it was generally moved through East

Portland. It can move into Portland and East Portland and be delivered to the O.-W. R. & N. It could move by Springfield Junction and the west side line to Portland and St. Johns, the rates being unrestricted as to routing south of Portland or East Portland. Springfield Junction is a point about one hundred and twenty-three or four miles south of Portland, just opposite Eugene. It may move into Portland on the west side of the Willamette River, there being a physical track connection. From a physical standpoint and from a traffic standpoint there is no reason why sugar cannot move either by the east side line or the west side line through Portland or East Portland to St. Johns. There is no way of moving sugar from California points to St. Johns by the lines of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company except through Portland and East Portland.

Thereupon counsel for plaintiff inquired as follows:

Q. From a transportation standpoint would sugar moving to Portland and sugar moving to St. Johns move over the same line or route as far as Portland or East Portland?

MR. FARRENS: I object as calling for a conclusion of the witness of a physical fact of which the facts are in evidence or can be in evidence, and of which the court is as well or better qualified to judge than the witness.

THE COURT: I think he can answer the question.

Exception saved.

A. It would.

The witness testified further that there is a physical connection between the line of the Oregon-Washington Railroad & Navigation Company and Southern Pacific Company at Portland and East Portland. The tariffs in effect during the period of federal control covering transportation of sugar in carloads lots from originating points in California to St. Johns were Pacific Freight Tariff Bureau, Joint and Proportional Freight Tariff No. 1-B, F. W. Gomph, Agent, I. C. C. 55, effective September 15, 1912, and remained in effect until June 30, 1918. The subsequent issue was 1-C, and O.-W. R. & N. Co. Tariff, Local Freight Tariff No. 6-C, I. C. C. No. 312, which remained in effect until October 12, 1920. Item 815 of the tariff, a proportional commodity rate, northbound, applied on sugar from San Francisco, Marysville, Hamilton and other Group 1 points; from Salinas, Spreckles and Visalia to Portland and East Portland, and Betteravia, California, to Portland and East Portland. According to these tariffs the rate from San Francisco and Group 1 points to Portland and East Portland was thirteen cents per hundred; from Visalia, Spreckles and Salinas, twenty and one-half cents; from Betteravia, twenty-three cents. These figures were advanced 25% on June 25, 1918, by Director

General's Order No. 28 and Supplement 57 to this tariff.

(Thereupon the above mentioned tariff was admitted in evidence and marked plaintiff's Exhibit 3, and it was stipulated that plaintiff might have the right to withdraw the exhibit subject to call at any time.)

The rate from Portland and East Portland to St. Johns is carried in Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. 312, effective October 25, 1914, and remained in effect until October 12, 1920. Item 60 of that tariff provided a rate on freight not otherwise specified, from Portland and East Portland to St. Johns, Oregon, of thirty-seven and one-half cents per ton, minimum weight per car of 20,000 pounds.

(This tariff was admitted in evidence and marked plaintiff's Exhibit 4, with stipulation that plaintiff might withdraw the same subject to call.)

The witness then testified that the routing carried on page 84 of the tariff provided that the rates would apply from Southern Pacific Company points in California to Oregon-Washington Railroad & Navigation Company points via Portland or East Portland.

From the beginning of federal control until June 25, 1918, the rates from the originating points mentioned in the complaint were carried in United States Railroad Administration, Southern Pacific Railroad Local Joint and Proportional Freight Tariff No. 729-B, I. C. C.

No. 3659, at page 159, Item 102-A. The rate from San Francisco was twenty cents per hundred pounds, Alvarado, twenty-three cents, Crockett, twenty-three cents, Hamilton, twenty-five cents, Visalia, twenty-seven and one-half cents, Salinas, twenty-three cents, Betteravia, twenty-five cents. These figures were increased 25% on June 25, 1918, making from San Francisco twenty-five cents, Alvarado, twenty-nine cents, Crockett, twenty-nine cents, Hamilton, thirty-one and one-half cents, Visalia, thirty-four and one-half cents, Salinas, twenty-nine cents, Betteravia, thirty-one and one-half cents.

(The last mentioned tariff was admitted in evidence and marked plaintiff's Exhibit 5, it being stipulated that the plaintiff might have the right to withdraw the same subject to call.)

Thereupon counsel for plaintiff made a statement as follows:

MR. WILSON: I would like to offer in evidence, if your Honor please, a portion of Rule 77 of Tariff Circular 18-A issued by the Interstate Commerce Commission, which I will read into the record. It is a portion of paragraph 77 of Interstate Commerce Circular No. 18-A: "When the Commission has issued an order granting a carrier authority to depart from provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distances over the same line or route, the title page of each tariff issued and filed under such authority must bear

the following notation: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distance over the same route. Such departure from the terms of the amended fourth Section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. . . of (date)'. When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge rates or fares higher than the aggregate of the intermediate rates or fares subject to the Act, the title page of each tariff issued and filed under such authority must bear the following notation: 'This tariff contains rates (or fares) that exceed the sums of the intermediate rates (or fares) subject to the act. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. of (date)'. Nothing in this rule may be construed as waiving any of the provisions of the amended fourth section of the Act to Regulate Commerce."

The witness then testified further that the title page of the original Tariff 1-B carried the following clause: "By authority of Rule 77 of the Interstate Commerce Commission, Tariff Circular No. 18-A, rates in individual items (making specific reference to Items Nos 165 and 170) are not made applicable from or to, as the case may be, all intermediate points. Upon reasonable request therefor rates which would not exceed

those in effect from or to, as the case may be, more distant points, will, under authority granted by the Interstate Commerce Commission, be established from or to, as the case may be, any intermediate point hereunder, upon one day's notice to the Commission and to the public."

Item 815 of Tariff 1-B did not carry any reference to Items 165 or 170 as required by the clause carried on the title page of the tariff, and therefore had no reference to tariff charges on the joint and proportional rates from these originating points to Portland and East Portland. The tariff providing the rate from Portland and East Portland to St. Johns made no reference to paragraph 77 of the Interstate Commerce Tariff Circular No. 18-A.

CROSS-EXAMINATION.

Questions by Mr. Farrens:

The witness testified on cross-examination as follows: The station of Betteravia is located on the Santa Maria Valley Railroad. I do not know whether or not that railroad was under the control of the Director General of Railroads. The rate named from Betteravia to Portland was a joint through rate, and the Santa Maria Valley Railway was a party to the tariff. I do not know whether or not Southern Pacific Company owns the railroad from East Portland to Portland. From general knowledge the bridge over the Willamette River between Portland and East Portland is the prop-

erty of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company jointly. The Northern Pacific Terminal Company operates the tracks on the West Side of the Steel Bridge over the Willamette River, upon which deliveries were made to my assignors in this case in West Portland, but I do not know who owns said tracks. I couldn't state the actual physical connection point between Southern Pacific Company's West Side branch line and Northern Pacific Terminal Company's lines in Portland, but the tariff applies that way. I am not concerned with whether or not the ordinances under which Southern Pacific Company operates its lines north of the Southern Pacific Company's Jefferson Street station permit the handling of freight. I am speaking from a tariff standpoint exclusively. As to the ownership of the property I know nothing. I do not know of any shipment of sugar ever having moved to St. Johns via the Southern Pacific Company's West Side lines. It would usually move via Southern Pacific to East Portland and thence to St. Johns over the lines of the Oregon-Washington Railroad & Navigation Company without crossing the Steel Bridge or the Willamette River into Portland, but it could move into Portland and thence back over the bridge to East Portland and thence to St. Johns. I do not know of any shipment of sugar being transported from the points of origin mentioned in my complaint to St. Johns during the period of federal control of railways.

If a shipment of sugar were transported from any

of the points of origin mentioned in my complaint to St. Johns via Portland it would be necessary for it to be hauled across the Steel Bridge over the Willamette River on to the trackage of Northern Pacific Terminal Company and then hauled back over the trackage of Northern Pacific Terminal Company, taken back across the Steel Bridge and the Willamette River and delivered to the Oregon-Washington Railroad & Navigation Company at the same point at which it would ordinarily be delivered without any such movement back and forth across the river and through the yards of the Northern Pacific Terminal Company, but I would consider Portland intermediate to St. Johns on the same line or on the same route because the tariff provides for routes which would permit of such movement. On page 84 it provides for routing to St. Johns either via Portland or East Portland.

If a shipment moved to Portland over the Southern Pacific lines from points of origin mentioned in my complaint and was diverted from Portland to St. Johns, there would have been a diversion or reconsignment charge made for that service. There would have been also a diversion charge on a shipment of sugar from the point of origin mentioned in my complaint through East Portland to St. Johns.

The Oregon-Washington Railroad & Navigation Company's Tariff 6-C, to which I have referred, was the switch tariff which named the rate from East Portland to St. Johns over the Oregon-Washington Rail-

road & Navigation Company's lines. Item 1 of this tariff 6-C, that refers to application to or from connecting lines, provides as follows:

“Terminal facilities provided by this company are intended and required for its own business, in view of which and the practice generally prevailing with respect to the use of terminal facilities, the rates named herein will not apply to and from team tracks on freight received from or delivered to connecting lines. Note: Freight will not be accepted at or delivered to warehouse or industrial tracks when for interchange with connecting carriers unless shipped by or consigned to parties permanently located on such warehouse or industrial tracks.”

Item 60-G of Supplement 23 of Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. 312, effective December 31, 1919, provides a switch charge between St. Johns and Portland of \$7.50 a car and between St. Johns and East Portland of \$5.00 per car, and this item carries two symbols, one of which indicates that these rates apply only on freight initiating with water carriers at St. Johns, Oregon, and when delivered to or received from railroad connections of the Oregon-Washington Railroad & Navigation Company at East Portland or Portland, Oregon, in line haul movement will not apply on carload freight originating at or destined for points situated on the Oregon-Washington Railroad & Navigation Company's line and its connections where line

haul can be performed by the Oregon-Washington Railroad & Navigation Company line. The same item carries the rate of thirty-seven and one-half cents per ton from Portland and East Portland without any such restrictions as apply to those two rates of \$7.50 and \$5.00 per car.

Southern Pacific Company's Tariff No. 729-B, I. C. C. No. 3659, was the tariff which named Southern Pacific Company local rates from points of origin mentioned in the complaint to East Portland.

The blanket supplement which was issued to all tariffs on June 24, 1918, the same being Supplement 5 to Tariff 729-B, carries reference to the Interstate Commerce Commission Fourth Section Order 7316 of May 27, 1918. This reference is on the title page of the supplement and reads as follows:

"This schedule contains rates that are departures from rates of the amended fourth section of the Act to Regulate Commerce under authority of Interstate Commerce Commission fourth section order 7316 of May 27, 1918." It also carries on the title page the following statement:

"The rates made effective in this schedule are initiated by the president of the United States through the Director General of the United States Railroad Administration and apply to interstate traffic only. This schedule is published and filed on one day's notice to the Interstate Commerce Commission under General

Order No. 28 of the Director General of the United States Railroad Administration. Dated May 25, 1918, and amended June 12, 1918."

The rates referred to in that supplement remained in effect until the termination of federal control.

Allen & Lewis Company, one of my assignors, was located on Front Street on the line of the United Railways. If any of the shipments received by Allen & Lewis were delivered to them by the United Railways at the point I have just mentioned there may have been a switching charge in addition to the rate they paid. I do not know whether or not the United Railways was under federal control.

Thereupon the witness testified as follows:

Q. Would you as a rate expert say that the movement of a carload of sugar from any of the points of origin named in your complaint to Allen & Lewis in West Portland, delivered over the lines of the United Railways, would be over the same route as the movement of a carload of sugar from the same point of origin to St. Johns?

A. The United Railways would not appear as a party to the through rate to St. Johns.

Q. It follows, then, doesn't it, that if any shipments mentioned in your complaint were delivered to your assignors by the United Railways, that those shipments did not move over the same route as shipments from California to St. Johns?

A. If, as you stated, that there was a switching charge over and above that, that would be a factor entirely independent of the rate to St. Johns,—

Q. I am not asking about the rate.

A. (Continuing)— or to East Portland.

Q. I am asking about the route. Answer my question about the route, please?

A. The United Railways would not be a party to the through rate to St. Johns.

Q. What about the route? What about the route?

A. Nor to the route.

STIPULATION OF COUNSEL

It is stipulated between counsel for the respective sides that all of the shipments shown in the exhibits to the complaint, with the amendments thereto, moved from the originating points to Portland, or East Portland, Oregon, and that the Director General received the amount of the charges as shown in the exhibit.

TESTIMONY OF FRANK KERR FOR PLAINTIFF.

FRANK KERR, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am secretary of Wadhams & Kerr Bros. Company, a corporation, engaged in the general wholesale

mercantile business. Wadhams & Kerr Bros. Company received the shipments evidenced by these freight bills. These shipments were received in Portland at 13th and Davis Streets upon tracks served by Northern Pacific Terminal Company. Wadhams & Kerr Bros. Company paid the freight on each of these shipments at the freight shed of Southern Pacific Company in the terminal ground.

(The package of freight bills to which this witness referred were admitted in evidence and marked plaintiff's Exhibit 6.)

Wadhams & Kerr Bros. Company executed two assignments of these claims on these various shipments to A. J. Parrington. They were signed by the president and secretary.

MR. WILSON: I offer them in evidence.

MR. FARRENS: Objected to on the ground that this assignment is not made out in the manner and subject to the requirements of Section 3477, of the Revised Statutes of the United States, designating the manner in which assignments of claims against the government must be made in order to be valid.

THE COURT: Admitted subject to your objection.

MR. FARRENS: Save an exception. (Exception allowed.)

(Thereupon these two assignments were marked respectively plaintiff's Exhibits 7 and 8, and are attached to this bill of exceptions and made a part hereof.)

CROSS EXAMINATION

Questions by Mr. Farrens.

Thereupon on cross examination the witness testified that the industrial trackage of Wadhams & Kerr Bros. Company was operated by the Northern Pacific Terminal Company, and that all switching charges were paid to the Northern Pacific Terminal Company.

MR. FARRENS: You were not afterwards reimbursed by any one else for any part of these freight charges?

THE COURT: That doesn't make any difference; if they paid it for themselves, suppose some one else did give them the money later.

MR. FARRENS: Save an exception.

MR. FARRENS: Now, during the period of federal control of railroads, the United States Food Administration limited the profit that you made on the sale of sugar in this city, didn't they?

A. Yes, sir.

Q. Can you say whether or not your company sold the shipments of sugar which are credited to your company in this complaint for a price which was equal to the maximum profit allowed?

MR. WILSON: I object to that as immaterial.

THE COURT: What has that to do with this case?

The right to recover on this freight?

MR. FARRENS: If the court please, I don't know what view your Honor takes of the measure of damages in this case. But in the Intermountain Coal case the United States Supreme Court has indicated, and the Interstate Commerce Commission has always, without exception, ruled that a violation of the fourth section of the Interstate Commerce Commission Act didn't mean that the difference between any two sets of rates was the measure of damages. The plaintiff must prove that he was damaged, that he has personally suffered injury; not a mere technical question of subtracting one rate from the other is the measure of damages. This is not an overcharge case, this is a damage case.

THE COURT: I thought the courts held that the measure of damages is the difference in freight.

MR. WILSON: The Circuit Court of Appeals has, and your Honor held it; this International case referred to is a rebate case.

THE COURT: That is already settled so far as this district is concerned.

MR. FARRENS: Exception saved.

TESTIMONY OF H. A. CARR FOR
PLAINTIFF

H. A. CARR, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am in the wholesale grocery business at 51 Front Street, Portland. Carr & Preston paid the transportation charges shown upon the shipping receipt which I hold in my hand.

(The shipping receipt was admitted in evidence and marked plaintiff's Exhibit 9.)

The witness then testified further that Carr & Preston had executed an assignment of its claim on said shipment to A. J. Parrington. Counsel for plaintiff offered said assignment in evidence, whereupon the following proceedings were had.

MR. FARRENS: I want to make the same objection, that it does not comply with Section 3477, Revised Statutes of the United States. May that be considered as made without repeating?

THE COURT: As to all assignments in that form.

MR. FARRENS: An exception as to each of them.

(An exception was duly allowed and thereupon the

assignment was admitted in evidence and marked plaintiff's Exhibit 10, and is attached to this bill of exceptions and made a part hereof,)

**TESTIMONY OF H. C. FROST FOR
PLAINTIFF.**

H. C. FROST, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am connected with Starr Fruit Products Company, located at East First and Yamhill Streets, East Portland, and have a switch directly from Southern Pacific Company and O.-W. R. & N.

MR. WILSON: I hand you herewith a number of freight receipts, and ask you who paid the freight shown on these receipts?

A. The Starr Fruit Products Company.

MR. WILSON: I offer it in evidence.

MR. FARRENS: I desire at this time to object to the introduction of such of these freight bills in evidence as disclose on their face that payments were made more than two years prior to the date of the complaint filed in this case.

THE COURT: That on the theory barred by the statute?

MR. FARRENS: Yes, under the decision of the

United States Supreme Court in the case of K. C. & C. Ry. vs. Wolfe.

THE COURT: Put them in subject to the objection.

MR. FARRENS: Save an exception.

(The exception was duly allowed and the freight receipts were admitted in evidence and marked plaintiff's Exhibit 11.)

MR. WILSON: The Starr Fruit Products Company assigned its claim against the carrier to A. J. Parrington, the plaintiff in this case, didn't it?

A. Yes, sir.

MR. WILSON: And that is the assignment, is it?

A. Yes, sir.

MR. WILSON: Offered in evidence.

THE COURT: Admitted subject to the same objection and exception.

(Thereupon said assignment was admitted in evidence and marked plaintiff's Exhibit 12, and is attached to this bill of exceptions and made a part hereof.)

After this witness was excused the following proceedings were had:

MR. FARRENS: (Referring to all of plaintiff's

exhibits respecting freight charges paid more than two years prior to the commencement of action.) In order to make a record I would like to make the same motion based on the statute of limitations as made with respect to the exhibits offered by the witness, Mr. Kerr, of Wadhams & Kerr, namely, that those exhibits be stricken from the files in this case.

THE COURT: You will be entitled to urge that on the final argument as to all items that are barred by the statute.

TESTIMONY OF E. B. REYNOLDS FOR PLAINTIFF.

E. B. REYNOLDS, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am cashier of Lang & Company and have charge of the payment of moneys for freight on behalf of Lang & Company. Lang & Company paid the freight charges shown on this freight bill.

(The freight bill was then offered in evidence and marked plaintiff's Exhibit 13.)

Objection was raised by counsel for defendant that the face of the freight bill showed that it had been paid more than two years prior to the commencement of this action. The objection was overruled, exception was allowed and the freight bill was admitted in evidence and marked plaintiff's Exhibit 13.

The witness then identified the signature of I. Lang as president of Lang & Company to a certain assignment to A. J. Parrington of said company's claim on account of transportation charges paid as shown by said freight bill, plaintiff's Exhibit 13. Thereupon counsel for defendant objected upon the ground that said attempted assignment was invalidated by the provisions of Section 3477 of the Revised Statutes of the United States, which objection was overruled, exception allowed and said assignment was admitted in evidence and marked plaintiff's Exhibit 14, and is attached to this bill of exceptions and made a part hereof.

CROSS EXAMINATION

Questions by Mr. Farrens.

Q. Lang & Company bought this sugar for the purpose of re-sale, didn't they, rather than for use in manufacturing purposes?

A. Yes, sir.

Q. Do you know whether or not the price of sugar was limited by the United States Food Administration in such a manner that a dealer could only secure a certain profit during the period of federal control?

A. I don't know.

Q. And you don't know whether or not that profit was secured by your company then?

A. I don't know.

TESTIMONY OF F. A. LEHMAN FOR
PLAINTIFF.

F. A. LEHMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am traffic man for Mason, Ehrman & Company. Freight charges are approved by me before being paid by that company.

MR. WILSON: Now, I will hand you herewith some paid freight bills, some of which are shown here by copies and some by originals, and will ask you if you know who paid the freight charges represented by those expense bills?

A. Mason, Ehrman & Company.

MR. WILSON: I offer them in evidence; some of these are copies of which I have spoken to Mr. Farrens, and he has agreed that copies may be used.

MR. FARRENS: No objection to their being other than originals, but I do wish the same objection on the ground of the statute of limitations.

(Thereupon the court overruled the objection, allowed an exception, and the freight bills were admitted in evidence and marked plaintiff's Exhibit 15.)

Thereupon the witness identified the signature of S. Mason Ehrman, secretary of Mason, Ehrman & Company, to a certain assignment of that company's claims

to A. J. Parrington; counsel for plaintiff offered said assignment in evidence; counsel for defendant objected thereto on the ground that said assignment was invalidated by the provisions of Section 3477 of the Revised Statutes of the United States; the court overruled the objection, allowed an exception and the assignment was admitted in evidence and marked plaintiff's Exhibit 16, and is attached to this bill of exceptions and made a part hereof.

CROSS EXAMINATION.

Questions by Mr. Farrens.

MR. FARRENS: Do you know whether or not Mason, Ehrman & Company, Inc., executed an assignment in favor of the Pacific Adjustment Company, a California corporation?

THE COURT: He said he didn't have anything to do with the assignments; he is the traffic manager.

MR. FARRENS: He is the traffic manager, and takes care of the collection of these rates, and I thought he probably might know.

MR. FARRENS: Would you be able to say whether or not that is a photostatic copy of what purports to be an assignment and what purports to be signed by Mason Ehrman? Can you say whether or not that is the signature of S. Mason Ehrman?

A. That is the signature of S. Mason Ehrman, yes.

MR. WILSON: Entirely subsequent to that as-

signment, so I say it is absolutely immaterial here.

MR. FARRENS: Offered in evidence.

MR. WILSON: Objected to as immaterial and irrelevant, subsequent to the assignment here involved.

MR. FARRENS: This exhibit (16) is an assignment for collection only, whereas this exhibit is an absolute assignment from Mason, Ehrman & Company to the Pacific Adjustment Company of all claims it has against the United States Railroad Administration.

THE COURT: Have you set up that in defense?

MR. FARRENS: No, but I think it goes to the question of whether or not this company has assigned.

THE COURT: You deny it in the answer?

MR. FARRENS: Yes.

THE COURT: Put it in the record.

(The document was admitted in evidence and marked defendant's Exhibit A, and is attached to this bill of exceptions and made a part hereof.)

TESTIMONY OF F. P. KENSINGER FOR PLAINTIFF.

F. P. KENSINGER, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am traffic manager of Tru-Blu Biscuit Company. I know from the records of that company that these freight bills were paid by Tru-Blu Biscuit Company.

MR. WILSON: I offer these in evidence.

MR. FARRENS: One of the freight bills is subject to the objection concerning the statute of limitations.

(Thereupon the court overruled said objection, allowed an exception, and the freight bills were admitted in evidence and marked plaintiff's Exhibit 17.)

Thereupon the witness identified the execution by Tru-Blu Biscuit Company of an assignment of said company's claims to A. J. Parrington, and counsel for plaintiff offered said assignment in evidence; counsel for defendant objected upon the ground that said assignment was invalidated by Section 3477 of the Revised Statutes of the United States, which objection the court overruled, allowed the exception, and said assignment was admitted in evidence and marked plaintiff's Exhibit 18, and is attached to this bill of exceptions and made a part hereof.

TESTIMONY OF F. A. SMITH FOR PLAINTIFF.

F. A. SMITH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am traffic manager for Wadhams & Company, and approve freight bills before they are paid by that company. These two freight bills were paid by Wadhams & Company.

Thereupon counsel for plaintiff offered said freight bills in evidence; counsel for defendant objected to the admission of one of said freight bills because it appeared

upon the face of said bill that the same was paid more than two years prior to the commencement of this action; the court overruled the objection, allowed an exception, and the freight bills were received in evidence and marked plaintiff's Exhibit 19.

Thereupon the witness identified the signature of Mr. Hahn, the manager of Wadhams & Company, to an assignment of said company's claims to A. J. Parlington; counsel for plaintiff offered same in evidence; counsel for defendant objected thereto on the ground that said assignment was invalidated by Section 3477 of the Revised Statutes of the United States; the court overruled the objection, allowed an exception, and said assignment was received in evidence and marked plaintiff's Exhibit 20, and is attached to this bill of exceptions and made a part hereof.

CROSS EXAMINATION

Questions by Mr. Farrens.

MR. FARRENS: I hand you what purports to be a photostatic copy of an assignment executed by Wadhams & Company in favor of the Pacific Adjustmen Company, a California corporation, covering all claims which Wadhams & Company had against the United States Railroad Administration. By whom is the name Wadhams & Company signed?

A. By Henry Hahn, president of the company.

Q. Are you familiar with his signature?

A. I am.

Q. Would you say that was a photostatic copy of his signature?

A. Yes, I would.

(Thereupon said instrument was received in evidence and marked defendant's Exhibit B, and is attached to this bill of exceptions and made a part hereof.)

TESTIMONY OF S. C. MORRIS FOR PLAINTIFF.

S. C. MORRIS, called as a witness for plaintiff, being first duly sworn, testified as follows:

I am Traffic Manager for Allen & Lewis. Allen & Lewis paid the charges on these four freight bills.

Thereupon counsel for plaintiff offered said freight bills in evidence; counsel for defendant objected to the admission of such of said bills as showed on their face that they had been paid more than two years prior to the commencement of this action; the court overruled the objection, allowed an exception, and the freight bills were admitted in evidence and marked plaintiff's Exhibit 21.

Thereupon the witness identified, and counsel for plaintiff offered in evidence, an assignment executed by Allen & Lewis to A. J. Parrington, covering the claims of said Allen & Lewis. Counsel for defendant objected to the admission of said document in evidence on the ground that same was invalidated by the pro-

visions of Section 3477 of the Revised Statutes of the United States; the court overruled the objection, allowed an exception, and the document was admitted in evidence and marked plaintiff's Exhibit 22, and is attached to this bill of exceptions and made a part hereof.

CROSS-EXAMINATION.

Thereupon the witness testified further that Allen & Lewis received delivery of its carloads of sugar on the line of United Railways Company during the period of federal control.

RE-DIRECT EXAMINATION.

Questions by Mr. Wilson:

MR. WILSON: When you get United Railways delivery you have to pay an additional switching charge, don't you?

A. We did.

Q. And no part of that switching charge is covered by—no part of the charges for that delivery by the United Railways is covered by these shipping receipts?

A. No, sir.

Q. And that charge is not collected by the Southern Pacific Company or the Director General?

A. It is collected by the Southern Pacific.

Q. So that any charges you paid for that delivery

by the United Railways is in addition to the charges in the exhibit offered?

A. Yes.

Mr. FARRENS: I move to strike both of the last two answers. I tried both times to object before the witness answered, on the ground that they are irrelevant and immaterial, whether or not there were additional charges over and above the charges mentioned in plaintiff's complaint, as to those shipments moving to Allen & Lewis. The point is that shipments moving to Allen & Lewis Company on the United Railways are not the same routing.

THE COURT: Let the evidence stand as it is.

To this ruling of the court counsel for defendant requested and was allowed an exception.

TESTIMONY OF W. A. BAKER FOR PLAINTIFF.

W. A. BAKER, called as a witness for plaintiff, being first duly sworn, testified as follows:

I am Traffic Manager for Meier & Frank Company. Meier & Frank Company paid the freight shown on these two receipted bills.

Thereupon counsel for plaintiff offered said freight bills in evidence, to which offer counsel for defendant objected on the ground that it appeared on the face of said bills that the same were paid more than two years

prior to the commencement of this action; the court overruled said objection, allowed an exception and the documents were admitted in evidence and marked plaintiff's Exhibit 23.

TESTIMONY OF A. J. PARRINGTON ON HIS OWN BEHALF.

(Recalled.)

A. J. PARRINGTON, recalled as a witness on his own behalf, testified as follows:

Oregon-Washington Railroad & Navigation Company and Southern Pacific Company are both named as parties on the title page to the tariff Pacific Freight Tariff Bureau, Joint & Proportional Freight Tariff 1-B, F. W. Gomph, I. C. C. 110. This tariff shows an index of points from which northbound rates apply, which includes all of the sugar shipping points at issue in this case, and it also carries an index of points to which northbound rates apply. St. Johns, Oregon, is shown in that list of northbound destinations as taking Group 7 rate. There are a number of through commodity rates published from various California points to destinations named in the tariff. In Item 180, on page 57, of this tariff, there is prescribed a basis for making through rates except where through rates are provided, and it reads:

“Between San Francisco, Stockton and other points on the lines of Atchison, Topeka & Santa Fe Coast

Lines, shown in Items 185 to 970, inclusive, pages 57 to 72, and points on the Oregon-Washington Railroad & Navigation Company, the basis is set forth as follows: Add to the proportional rates shown in Items 185 to 970, inclusive, on pages 57 to 72, inclusive, the rates from each to Portland or East Portland, Oregon, published in the tariffs referred to below, supplements thereto, or re-issues thereof."

O.-W. R. & N. Co. Tariff No. 6, I. C. C. No. 55, and reissues thereof and supplements thereto, is included in this list. The sugar item in this tariff is No. 815. In making rates on sugar under this tariff you use the joint and proportional rate to Portland, plus the rate given in the tariff referred to as 6 or the issues thereof. Tariff No. 6 and the reissues thereof provide a switching rate from Portland or East Portland to St. Johns. The switching rate on sugar from Portland and East Portland to St. Johns, under Tariff 6-C, was thirty-seven and one-half cents per ton of 2000 pounds, minimum carload 20 tons. The same item, 60-G, in this switch tariff, carries a rate between St. Johns and Portland of \$7.50 per car, and between St. Johns and East Portland of \$5.00 per car, subject, however, to a provision as follows: "Applies only on freight interchanged with water carriers at St. Johns, Oregon, and when delivered to or received from railroad connection of O.-W. R. & N. at East Portland or at Portland, Oregon, in line haul movement."

The witness then gave testimony tending to prove

that if the ruling last above quoted prevented the switching rates of \$7.50 and \$5.00 per car from being applicable between Portland and East Portland and St. Johns, the switch tariff nevertheless carries a thirty-seven and one-half cent per ton rate, which was not so limited, and thereupon the following proceedings were had:

MR. FARRENS: Objected to because counsel is now trying to prove a different measure of damages or different rate than alleged in the complaint.

MR. WILSON: No, I am not. I would like your Honor to take a look at this tariff.

MR. FARRENS: My objection has nothing to do with the truth or falsity of the statement as just made, but I call your attention to the fact that the 6th paragraph of the complaint alleges a measure of damages and makes a statement as to the rates in existence from December 31, 1919, to the end of federal control, says that by Supplement No. 27 of the O.-W. R. & N. Co. Local Freight Tariff No. 6-C, I. C. C. 312, Item 60-G, a certain rate was in effect; a rate of \$7.50 per car; and further on in his complaint he alleges that this is the measure of his damages, the difference between what was paid and that proportional rate plus \$7.50 per car. Now, I contend that he is trying to introduce evidence to support an allegation which is in variance with his complaint, and which would tend to support a different measure of damages than that which he has alleged.

MR. WILSON: If there is any doubt in your Honor's mind, the evidence having been introduced without objection, I would like leave to amend the complaint to conform with the proof.

MR. FARRENS: As far as the introduction of the evidence without objection, the type of counsel's question was such as to give me no warning what he was intending to elicit from the witness. Had I known, I would have objected and I move now to strike from the record.

THE COURT: Let the record remain.

MR. WILSON: As as a matter of fact, I don't concede. I am saying that according to his interpretation of that paragraph; I don't give it the same interpretation he does. I say it does apply. He is wanting, your Honor, to make it apply in only one instance, and I say the case is susceptible of application in two instances, to wit, both when the shipment is received from water carrier and also when it is in connection with line haul of connecting carrier, because otherwise they wouldn't put in the clause "when" after the word "and" if it were to be in one instance only. Now, it says when received from ship and when it is in connection with line haul. But I say if there is any doubt in your Honor's mind that the 37½ cents per ton still applies instead of the \$7.50 per car applying prior to the issuance of this tariff.

MR. FARRENS: If the court please, in those in-

stances where evidence is permitted to go in, either in counsel's case in chief or in my case in chief later on, may it be always understood where objection has been made, that we have asked for an exception, and that it has been granted.

THE COURT: That may be understood, yes. The case is being tried before the court and I don't wish the testimony stricken out.

It was then stipulated between counsel that the proclamation of the president taking over the control and operation of the railroad systems, 40 Statutes at Large, page 1723, might be considered in evidence, and the witness further testified that the Director General adopted and continued in effect the tariffs existing on the date of commencement of federal control.

CROSS-EXAMINATION.

The witness testified that the rules limiting the application of the switching rates between Portland, East Portland and St. Johns, named in Switching Tariff 6-Series, were invalid because they were not also set forth in Tariff 1-B, which named the proportional rate from points of origin in California to Portland and East Portland. However, if Tariff 6-Series did not name a rate to St. Johns at all the combination of the two tariffs would not have created a rate from points of origin to St. Johns.

STIPULATION.

MR. FARRENS: Mr. Wilson and I mutually de-

sire to shorten the record by stipulation of facts, to the effect that during the period of federal control of railroads, the bridge across the Willamette River at Portland, commonly known as the Steel Bridge, connecting the line of the Southern Pacific Company and the O.-W. R. & N. Co. on the east side of the Willamette River with the Northern Pacific Terminal Line on the west side of said river, was owned in common by the O.-W. R. & Co., and and Oregon & California Railroad Company, and that the Southern Pacific Company, by virtue of a lease of the Oregon-California Railroad Company's property, had operating rights over said bridge, and was the lessee of the Oregon-California Railroad Company's rights therein; that all lines of railroad in the immediate vicinity of the Portland station and west of the west end of the said steel railroad bridge are owned by the Northern Pacific Terminal Company; that all the shipments of sugar mentioned in plaintiff's complaint which were destined to Portland station, or what we have referred to as West Portland, were handled by and moved over the said bridge and said tracks of the Northern Pacific Terminal Company; that the Southern Pacific Company owned twenty per cent of the stock of the Northern Pacific Terminal Company; that the O.-W. R. & N. Co. owned forty per cent of the stock of the Northern Pacific Terminal Company; that the Director General was in possession of and operating the line of the Southern Pacific Company, the lines of the O.-W. R. & N. Co. and the lines of the Northern Pacific Terminal Company during the period

of federal control.

MR. WILSON: And also that the Oregon-California, and the Southern Pacific Company as lessee, has an agreement of lease of all facilities of the Northern Pacific Terminal Company, and it and its predecessors in interest had had such since 1882.

MR. FARRENS: I think that is right, yes, and I think you will agree further that the cars hauled for the Southern Pacific Company, for example, to a delivery on the Northern Pacific Terminal Company line, by the Northern Pacific Terminal Company are paid for to the Northern Pacific Terminal Company on a wheelage basis, comparing the amount of total business so hauled by the Northern Pacific Terminal Company over the period of a year for such basis.

MR. WILSON: No question about it. All of these lines, the Northern Pacific Railway Company, the Oregon-Washington Railroad & Navigation Company, and the Southern Pacific Company and its lessor, the Oregon-California Railroad Company have a joint lease of all of the property, and for operating convenience they operate it through the Terminal Company and pay for the service which they get for their particular property strictly on a wheelage basis.

MR. FARRENS: It is stipulated between counsel that various Interstate Commerce Commission—I mean the regularly published decisions may be referred to in

argument and briefs with like effect, as if introduced in evidence in this case.

MR. WILSON: In other words, the published volumes may be considered in evidence if any one wants to consider them. In connection with that stipulation we have just made, I have alleged in our complaint that the Southern Pacific Company owned all the lines of railroad from these points in California to Portland and East Portland. He has admitted that but in view of our stipulation I want it understood that, if it is deemed necessary the complaint may be considered amended to permit our stipulation referring to ownership and lease of the properties.

MR. FARRENS: That is agreeable.

TESTIMONY OF JAMES G. WILSON FOR PLAINTIFF.

JAMES G. WILSON, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The witness having announced that his testimony would be without interrogation and that its tendency would be to prove the sum which in his opinion was proper to be allowed as attorney's fees in this case. Counsel for defendant objected to the admission of any evidence by or through said witness upon the ground that attorney's fees were not allowed against the Director General of Railroads or the United States government in this case.

The court overruled the objection, allowed an exception, and thereupon the witness testified that in his opinion the sum of \$1200.00 was a reasonable attorney's fee to be allowed the plaintiff in this case.

CROSS-EXAMINATION

The witness testified that he had made two arguments in court, one of which was on a demurrer to plaintiff's complaint and the other on demurrer to defendant's answer. Neither of these arguments consumed more than thirty minutes.

STIPULATION OF COUNSEL.

MR. FARRENS: I had an understanding with counsel that he will admit the verity of the signature upon the document which purports to be a photostatic copy of the assignment of Lang & Company to the Pacific Adjustment Company of all its claims against the Director General of Railroads. I understand counsel does not stipulate it may be received.

Counsel for defendant then offered said document in evidence and counsel for plaintiff objected upon the ground that the date of said assignment was subsequent to the date of the assignment from Lang & Company to plaintiff, and that said document did not purport to assign anything except what the assignor had at the time of the execution of the assignment.

The court overruled the objection, allowed an exception and the document was admitted in evidence and

marked defendant's Exhibit C, and is attached to this bill of exceptions and made a part hereof.

STIPULATIONS.

MR. FARRENS: I also have an understanding with counsel for plaintiff that the franchise ordinances of the City of Portland granting the Oregon-California Railroad Company, and running to the Southern Pacific Company as lessee of the Oregon-California Railroad Company, under which the Southern Pacific Lines on Fourth Street were operated during the period of federal control contain this limit and provision: "That said railway tracks on said Fourth Street shall not be used or operated for the transportation of freight upon them except for the transportation of material for the construction or repair of said tracks and appurtenances, and for the construction and maintenance of the paving required by this ordinance, but shall be used for the transportation of passengers, mail, baggage and express thereon, under the limits hereinafter specified."

MR. WILSON: I agree that the ordinances contain that provision under which you are now operating.

MR. FARRENS: And under which we were operating during the period of federal control?

MR. WILSON: Under which the line was operated during the period of federal control.

MR. FARRENS: At this time, I desire to offer in evidence a certified copy of letter from John Barton Payne, General Counsel of the United States Railroad

Administration, addressed under date of June 25, 1918, to C. W. Gates, President of the Santa Maria Valley Railroad, advising him that the Santa Maria Valley Railroad was not under federal control.

MR. WILSON: I object as irrelevant and immaterial to the controversy on the ground that whether the line was under federal control or not, it governed the rates from Betteravia to the points of Portland and St. Johns, the Santa Maria Valley Railroad Company being a party to the tariff, and it is immaterial whether they were under federal control or not.

MR. FARRENS: I think it apparent that this document proves a defect in the parties defendant in this case.

THE COURT: Put it in.

MR. FARRENS: I would like to have considered as a part of this exhibit and to bear the same number, an agreement entered into between the Santa Maria Valley Railroad Company and the Director General, releasing the Director General from claims to the effect that this road was under federal control, and waiving all benefits of federal control, and a copy of the Board of Directors' resolution authorizing execution of that document in the name of the Santa Maria Valley Railroad Company.

(Thereupon said documents were admitted in evidence, marked defendant's Exhibit D, and are attached

to this bill of exceptions and made a part hereof.)

MR. FARRENS: I desire to offer a similar document relating to the United Railways.

MR. WILSON: I object as irrelevant and immaterial. There are no freight charges involved in this case for any transportation of any freight over the lines of the United Railways.

MR. FARRENS: Objection that counsel has made does not apply with the force in this instance that it did in the previous instance, for the reason, as your Honor will remember, it appeared in plaintiff's case in chief that delivery of goods to Allen & Lewis was accomplished over the lines of the United Railways.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit E, and is attached to this bill of exceptions and made a part hereof.)

MR. FARRENS: Will counsel agree that General Order No. 28 may be referred to as if in evidence?

MR. WILSON: Yes.

MR. FARRENS: I wish to offer in evidence Interstate Commerce Commission Fourth Section Order No. 7316. This document bears underscoring which was not in the original and it has no relation to the purpose for which it is offered here. It is not a certified copy but I understand that my arrangements with counsel are such that he will not object to it for that reason.

MR. WILSON: I object as irrelevant and immaterial, not in response to any issues in this case. Your Honor has already sustained the demurrer to their allegation setting up this identical document and therefore it is out of the case.

THE COURT: Is that the order of the Interstate Commerce Commission?

MR. WILSON: Order of the Interstate Commerce Commission; when the rates were increased the Interstate Commerce Commission made an order permitting them to violate the long and short haul clause as far as necessary to put in the increased rates, and your Honor sustained the demurrer to the allegation.

THE COURT: It may go in as part of the record for future reference.

(Thereupon said copy of said fourth section order No. 7316 was admitted in evidence and marked defendant's Exhibit F, and is attached to this bill of exceptions and made a part hereof.)

MR. FARRENS: I also wish to introduce copy of Interstate Commerce Commission's Order No. 7601. This offer is made because this latter order explains and interprets the original order No. 7316.

MR. WILSON: Objected to on the same ground.

THE COURT: Admitted under the same ruling.

(Thereupon copy of said order No. 7601 was admitted in evidence and marked defendant's Exhibit G, and is attached to this bill of exceptions and made a part hereof.)

TESTIMONY OF SAMUEL MURRAY FOR DEFENDANT

SAMUEL MURRAY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

I am Assistant Chief Engineer of the Union Pacific System, and have been in the Engineering Department of the Union Pacific and Southern Pacific twenty-two years. I was connected with the Engineering Department of the O.-W. R. & N. Co.—Union Pacific System—when the Steel Bridge across the Willamette River was built. The cost of this bridge, exclusive of real estate, signals, trackage or switch, was \$909,455.00. If freight from California points was transported to St. Johns via Portland it would have to be hauled across the bridge from East Portland to Portland and then be hauled back across the bridge from Portland to East Portland before proceeding to St. Johns.

TESTIMONY OF J. N. HARNEY FOR DEFENDANT

J. N. Harney, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

During the period of federal control of railroads I was agent for O.-W. R. & N. Co. at St. Johns, and the records of that station were in my possession and under my control. During the period of federal control there were no carload shipments of sugar received at the St. Johns station.

CROSS EXAMINATION

Questions by Mr. Wilson.

Over the objection of counsel for defendant to the effect that testimony concerning shipments of sugar moving subsequent to the period of federal control was irrelevant, and with exception allowed by the court, the witness gave testimony tending to prove that on August 10, 1921, a carload shipment of sugar was received at St. Johns and freight charges collected thereon on the basis of the proportional rate to Portland plus the switching charge to St. Johns.

REDIRECT EXAMINATION

Questions by Mr. Farrens.

The witness testified that said shipment of August 10, 1921, was delivered on the tracks of the Portland Woolen Mills near St. Johns because the consignee had no industrial track at that station, and because there were no team tracks available at St. Johns. The witness further testified that the parties who accepted delivery of said shipment stated that this shipment of sugar would be hauled back to Portland by truck. The witness further testified that it was his recollection that this particular shipment of sugar moved from points of origin in California to St. Johns through East Portland instead of through Portland.

Thereupon the following proceedings were had:

MR. FARRENS: I have an understanding with counsel that I may introduce letter from Mason, Ehr-

man & Company.

MR. WILSON: That is I admit they were signed by Mason, Ehrman & Company without proof of signature. I want to object to the matter.

MR. FARRENS: With that admission, I desire to offer in evidence letter from Mason, Ehrman & Company to Mr. Root who is secretary agents, specifying the points to which cars consigned to them should be delivered.

MR. WILSON: It being understood that Mason, Ehrman & Company's spur is on the Northern Pacific Terminal Company's track.

MR. FARRENS: I think it is; I will put on a witness to prove where that is.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit J, and is attached to this bill of exceptions and made a part hereof.)

MR. FARRENS: Also a letter from Allen & Lewis to Mr. Root, under date of December 17, 1918.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit K, and is attached to this bill of exceptions and made a part hereof.)

MR. WILSON: I make the same objection—

MR. FARRENS: Also Wadhams & Kerr Bros.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit L, and is attached to this bill of exceptions and made a part hereof.)

MR. WILSON: I object to them all as immaterial and irrelevant; they simply refer to giving orders with reference to delivery of cars.

MR. FARRENS: My purpose in offering the proof is to show where these carload shipments were actually delivered and that they didn't move over the same lines as if to St. Johns. I have an understanding with counsel if these letters are received in evidence I may withdraw the originals and substitute copies.

TESTIMONY OF JOHN MIEBUS FOR DEFENDANT

JOHN MIEBUS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Counsel for plaintiff objected to all testimony to be offered by this witness on the ground that the same was irrelevant and immaterial, which objection was overruled by the court and exception allowed.

During the period of federal control of railroads I was General Yard Master of the Northern Pacific Terminal Company of Oregon. During the period of federal control of railroads a carload of sugar from California destined for delivery to Allen & Lewis would have been carried by Northern Pacific Terminal Company from the west bank of the Willamette River, a

distance of approximately 1500 feet, where it would have been delivered to the United Railways Company, which latter company would have transported it to Front and Hoyt Streets, which is on the west side of the Willamette River in Portland, Oregon.

During the period of federal control of railroads a carload shipment of sugar from California consigned to Mason, Ehrman & Company would have been transported from the west bank of the Willamette River to 15th and Overton Streets by Northern Pacific Terminal Company a distance of a little less than a mile.

During the period of federal control of railroads a carload shipment of sugar from California to Wadham & Kerr Bros. Company would have been transported by Northern Pacific Terminal Company from the west bank of the Willamette River over tracks of Northern Pacific Terminal Company to 13th and Davis Streets, a distance of a little in excess of a mile.

Lang & Company's deliveries are made by Northern Pacific Terminal Company on its trackage on the west side of the Willamette River.

Wadhams & Company's deliveries are made by Northern Pacific Terminal Company on its trackage on the west side of the Willamette River.

Meier & Frank Company's deliveries are made by Northern Pacific Terminal Company on its trackage on the west side of the Willamette River.

CROSS EXAMINATION

Questions by Mr. Wilson.

Loaded freight cars intended for ultimate delivery by Northern Pacific Terminal Company are hauled by Southern Pacific Company from East Portland across the Steel Bridge over the Willamette River to an interchange track just beyond the west bridge head, from which track such cars are taken by Northern Pacific Terminal Company and delivered to their respective consignees at industry tracks or team tracks.

TESTIMONY OF J. H. MULCHAY FOR
DEFENDANT

J. H. MULCHAY, a witness called on behalf of defendant, being first duly sworn, testified as follows:

I am General Freight Agent for Southern Pacific Company in charge of freight traffic matters on its lines in Oregon, with headquarters at Portland. My entire experience over a period of thirty-two years has been in the Freight Traffic Department of the O.-W. R. & N. and the Southern Pacific Company, both in Portland and in San Francisco. For twenty-five years I have been directly connected with rate and traffic matters and have held all positions from office boy up to my present position, including the positions of Chief of Tariff and Rate Bureau, Assistant Chief Clerk, Chief Clerk, District Freight Agent, Assistant General Freight Agent and General Freight Agent.

MR. WILSON: I will admit Mr. Mulchay's qualifications as a tariff expert, familiar with tariffs, rate making, everything connected with the department.

Thereupon the witness testified further that during the period of federal control Southern Pacific local rates from points of origin mentioned in plaintiff's complaint to East Portland and Portland were carried in Southern Pacific Local Tariff 729-B, I. C. C. 3659, effective October 15, 1915, and in the succeeding Tariff 729-C I. C. C. 4092, effective December 6, 1919.

From the beginning of Federal control until June 24, 1918, the rates between the various points of origin mentioned in plaintiff's complaint and East Portland and Portland were as follows: From San Francisco twenty cents, from Alvarado twenty-three cents, from Crockett twenty-three cents, from Hamilton twenty-five cents, from Visalia twenty-seven and one-half cents, from Salinas twenty-three cents, from Betteravia twenty-five cents.

From June 25, 1918, until the end of federal control, the same rates remained in effect, plus a general increase of 25% authorized by Director General's Order No. 28, making the rates as follows: From San Francisco twenty-five cents, from Alvarado twenty-nine cents, from Crockett twenty-nine cents, from Hamilton, thirty-one and one-half cents, from Visalia thirty-four and one-half cents, from Salinas twenty-nine cents, from Betteravia thirty-one and one-half cents.

The above cited rates were the rates charged on the shipments mentioned in plaintiff's complaint.

These Tariffs Nos. 729-B and 729-C named rates to intermediate points on the Southern Pacific line between the points of origin mentioned in plaintiff's complaint and Portland or East Portland that were higher than the rate to Portland or East Portland, but these departures from the fourth section of the Act to Regulate Commerce were protected by I. C. C. Fourth Section Order No. 4650, and later by I. C. C. Fourth Section Order No. 7316.

Pacific Freight Tariff Bureau Tariffs Nos. 1-B and 1-C and 1-D, which were filed with the Interstate Commerce Commission by F. W. Gomph, the publishing agent, under his I. C. C. Nos. 110, 340 and 421, named a proportional rate which from the beginning of federal control to and including June 24, 1918, was as follows: From San Francisco thirteen cents for 100 pounds, from Alvarado, Crockett and Hamilton, thirteen cents, from Visalia and Salinas twenty-one cents, and from Betteravia twenty-three cents. On June 25, 1918, these proportional rates were increased 25% under Director General's Order No. 28, making the rates as follows: From San Francisco, Crockett, Alvarado and Hamilton, sixteen and one-half cents, from Visalia and Salinas twenty-five cents, from Betteravia twenty-nine cents.

During the period of federal control shipments of sugar did move under these proportional rates from points of origin mentioned in plaintiff's complaint to

points on the line of O.-W. R. & N. Co. beyond St. Johns in Oregon, Washington and Idaho. Such shipments moved from points of origin over Southern Pacific Company's lines to East Portland where the cars and waybills were turned over to the O.-W. R. & N. Co. for movement to final destination. However, in the case of a shipment originating at Betteravia, which is on the Santa Maria Valley Railway about five miles east of Guadalupe, California, same was hauled from Betteravia to Guadalupe over the line of the Santa Maria Valley Railroad, which was not under federal control except for a very short period.

During the period of federal control shipments moving on these proportional rates from California to points on the lines of the Northern Pacific Railway Company would have been hauled over the line of Southern Pacific Company to Portland, where the shipments would be turned over to the Northern Pacific Terminal Company, which company would transport the cars and make delivery to the Northern Pacific Railway Company on the west side of the Willamette River.

MR. FARRENS: Mr. Mulchay, as a traffic expert, would you or wouldn't you, say that the haul from California points mentioned in plaintiff's complaint to West Portland was over the same line or routed in the same direction and included within the haul from the said California points to St. Johns?

MR. WILSON: I object as immaterial, irrelevant and not a proper subject for opinion evidence.

MR. FARRENS: That is the question counsel asked his own traffic expert.

THE COURT: He can answer.

A. No.

MR. FARRENS: As a traffic expert, state whether or not the haul of a shipment to Allen & Lewis, such as mentioned in plaintiff's complaint, moving by Southern Pacific lines, Northern Pacific Terminal lines and United Railway lines, was over the same line or routed in the same direction, and included within the haul from said California points to St. Johns?

A. No, sir.

Q. Now, state your reasons to the court for making these last two answers.

MR. WILSON: I make my objection to all that.

THE COURT: I understand.

A. Well, there is no question but what there is a side line haul. The traffic to St. Johns moving via Southern Pacific lines and O.W. R. & N. lines moves directly north, while shipments going to Portland, west side, diverge from the East Portland terminals of the Southern Pacific Company, cross the bridge at the Willamette River to the west bank, where the cars are turned over to the Northern Pacific Terminal Company, and in the case of the Allen & Lewis shipment it was in turn delivered to the United Railways to be delivered at their warehouse on Front Street between

Couch and Davis. They go west, go south and go east again.

MR. FARRENS: Mr. Mulchay, would the line of the United Railways be included in any haul from Southern Pacific points to St. Johns?

A. No, sir.

Q. And would your answer apply to that question even if under the theory of counsel for plaintiff West Portland was also in route to St. Johns? Do you get my idea? Counsel takes the position that West Portland as well as East Portland is on the route to St. Johns. Now, I say as to this Allen & Lewis shipment, even if he is correct, would the route of the United Railways be included in the run from Southern Pacific points to Portland and St. Johns?

A. No, would be no possible way for the United Railways to handle shipments under the through rate.

Q. At that point I want to ask you to state whether or not the Northern Pacific Terminal Company was recognized in the tariffs then in effect as a separate line or separate entry?

A. Recognized as a separate railroad.

Q. Please state your authority for that?

A. Southern Pacific Company's—or Southern Pacific Terminal Tariff No. 230-Series provided "that except as may be otherwise specifically provided carload rates named in tariffs of the Southern Pacific Company lawfully on file with the Interstate Commerce

Commission and the Public Service Commission of Oregon apply to and from regular transfer, team or sidetracks of this company within yard limits at all stations and include the switching of cars both empty and loaded to and from such track; also to and from transfer, team or sidetracks of the Northern Pacific Terminal Company at Portland, Oregon, and to and from point of transfer with connecting carriers at stations shown below." These stations shown below name the different points at which transfer with connecting carriers exist. I will add to that the fact that in 1905, I believe it was, the question came up as to the necessity for showing the Northern Pacific Terminal Company as a party to the tariffs, and it was held under Interstate Commerce Commission rules, and also the condition under which tariffs would be applied that it was a separate railroad and must be made a party to all our tariffs. The tariff under question, 729, naming our local rates to Portland provides that it is subject to the rules and regulations governing terminal service; as such the Northern Pacific Company is made a party to all Southern Pacific Tariffs applying to and from Portland under Interstate Commerce Commission rules governing tariff publication.

Q. Now, I want to ask you some questions about Mr. Parrington's testimony this afternoon. You heard it, didn't you?

A. Yes, sir.

Q. Is there a joint and proportional rate named

by Tariff 1-B from the point of origin on the Southern Pacific lines to St. Johns?

A. There is a proportional rate named to East Portland, Portland, on traffic destined beyond, but that proportional rate is a rate of the Southern Pacific Company.

Q. Is it a joint rate?

A. No, it is not a joint rate.

Q. Is it a joint through rate?

A. No, sir; it is simply the factor used in making a rate.

Q. Was there any joint through rate in existence on sugar during the period of federal control from the points named in plaintiff's complaint to St. Johns?

A. No, sir.

Q. You heard Mr. Parrington's explanation of his theory to the effect that there was no restriction on the application of the rates named in tariffs of the 6-Series, as to method and place of delivery, because the similar restriction was not set out in full in Tariff 1-B. Did you hear that?

A. Yes, sir.

Q. What is your interpretation of that situation?

A. I don't agree with Mr. Parrington.

Q. Tell the court why.

A. We have here a tariff which provides that in

order to arrive at a rate on sugar from California to St. Johns or to points on the O.-W. R. & N. Company's line, that a certain figure will be used in connection with the rate made. Each rate is dependent upon the factors governing it, and by referring to Item 75 of Tariff 1-B, we find "terminal charges, privileges and allowances" which states "shipments made at rates named herein are subject to the terminal charges, privileges and allowances provided by tariffs of individual lines, parties to this tariff, and lawfully on file with the Interstate Commerce Commission." The factor used in making a rate beyond Portland is carried in O.-W. R. & N. Tariff No. 6-C, I. C. C. 312, effective October 25, 1914. In addition to that, Tariff 2-A was another O.-W. R. & N. Company tariff to be used in connection with the proportional rates, that tariff being O.-W. R. & N. I. C. C. 107—pardon me, I quoted the I. C. C. Number 6-C, I believe incorrectly—no, that is right, 312. The latter tariff was the general class and commodity tariff, applying between Portland and East Portland to points on the O.-W. R. & N. Co. line in Oregon, Washington and Idaho, included in which were rates between East Portland and Portland and St. Johns. With the tariffs being governed, or rather the factors being governed by the rules and regulations and conditions of each publication in which they were carried, the rates in Tariff 6-C (that is, 37½ cents a ton, minimum twenty tons) could not be applied except under the limitations of that tariff, and in accordance with Interstate Commerce Commission tariff rules. The tariff carries under the head of a general application

on page 2, Item 1, the following: "Terminal facilities provided by this company—" meaning the O.-W. R. & N. Company, which is the issuing line—"are intended and required for its own business in view of which and the practice generally prevailing with respect to the use of terminal facilities, the rates named herein will not apply to or from team tracks on freight received from or delivered to connecting lines." With this application is carried a note reading: "Freight will not be accepted on or delivered to warehouse or industrial tracks when for interchange with connecting carriers unless shipped by or consigned to parties permanently located on such warehouse or industrial tracks." The switching rate being thus limited in these applications brings us to the class rate tariff which is the only tariff naming rates to be applied in connection with the shipments consigned to or to be shipped by anyone not having regular industrial tracks and warehouses.

MR. FARRENS: Mr. Mulchay, I hand you plaintiff's exhibits 25 and 26. Having in mind Mr. Harney's testimony, that was not delivered to a party permanently located on an industrial track at St. Johns, what rate should have applied to the movement from East Portland—

MR. WILSON: Why limit to industrial tracks at St. Johns?

MR. FARRENS: That is the way the tariff reads.

MR. WILSON: Not as I read it. Why not ship to some person with industrial track down at St. Johns?

A. Wadhams & Kerr Company to my certain knowledge have no industrial track or warehouse at St. Johns, and the only legal rate which would be applicable to this shipment would be the proportional rate in effect at the time of the movement, which is $20\frac{1}{2}$ cents plus the class rate, that is the fifth class rate, of 11 cents, Portland to St. Johns, making through rate $31\frac{1}{2}$ cents, instead of the rate as charged $20\frac{1}{2}$ cents plus 47 cents per ton.

MR. FARRENS: Mr. Mulchay, that through rate of $31\frac{1}{2}$ cents had been a departure from the fourth section of the act of the Interstate Commerce Commission, that is it had been less than the rate to Portland?

A. Would not have been less than the rate to Portland, no. But it would have been a rate less than applied to points south of St. Johns and south of Portland, therefore was a departure from the fourth section of the act.

Q. What I mean, as between the Portland rate and the St. Johns rate?

A. No, sir.

Q. Would the combination of the proportional rate with the class rate, which you say is the proper method of making that rate, have produced a less rate to St. Johns than the rate to Portland?

A. No, sir; not at the time that shipment was made.

Q. Would they have been even?

A. Yes, sir. I have a question in my mind, the rate to St. Johns, the 32 cents—the question of fractions, I get plus 31½ cents but call it 32.

Q. With respect to this theory of the plaintiff to the effect that Portland is intermediate to St. Johns as a matter of routing, I wish you would tell the court if plaintiff's theory is correct—or rather assuming that plaintiff's theory is correct, what would prevent Tillamook from being intermediate to St. Johns?

A. The same reasoning would hold good in the case of any branch line movement, it simply being a degree, measuring by the amount of mileage out on the line.

Q. In other words, you mean it would always be possible for a shipment to be hauled by the main line, out to some point on a branch line, and back to the main line junction again, and on to final destination.

A. Yes, sir; shipments for St. Johns consigned through do not come to Portland.

Q. Did you hear Mr. Parrington's testimony yesterday with respect to the Portland Jefferson Street line—Portland Jefferson Street station line?

A. Yes, sir.

Q. Where was the Portland Jefferson Street sta-

tion on the Southern Pacific line during the period of federal control?

A. At the foot of Jefferson Street and on the west bank of the Willamette River; about two miles, possibly a little more, south of our main line station at Park and Hoyt Streets, in the terminal yard.

Q. Now, during the period of federal control, did the proportional rate mentioned in plaintiff's complaint apply at Southern Pacific Portland Jefferson Street station?

A. Yes, sir.

Q. The proportional rate, I say?

A. No, sir; I thought you said the local rate. No, the proportional rate on St. Johns business does not apply to Front and Jefferson.

Q. Would the proportional rate apply to shipment moving from any of the points of origin mentioned in plaintiff's complaint to the Jefferson Street station as final destination?

A. No, sir.

Q. During the period of federal control could a carload of sugar have been routed by Southern Pacific west side lines from the Jefferson Street station to Portland Park Street station, or by Southern Pacific west side lines and O.-W. R. & N. lines through Portland Park Street station to St. Johns?

A. No, sir.

Q. Why not?

A. While there is a physical connection as between our Jefferson Street station and our Park Street station to the Northern Pacific terminal yard we are prohibited from handling freight over the line, which is our electric line leading west from our main line at the foot of Jefferson Street to Fourth Street, continuing north on Fourth to Fourth and Hoyt Streets, where it connects with Northern Pacific Terminal Company, but the franchise under which that line is operated will not permit us to haul freight.

Q. Is that the only physical connection directly between the Jefferson Street station and the Portland Park and Hoyt Street station, which is owned by the Southern Pacific Company?

A. Yes, sir.

Q. Mr. Parrington said yesterday that there was an actual, physical rail connection over which freight cars could be moved between the Portland Jefferson Street station and the Portland Park and Hoyt Street station; is that a fact?

A. Well, there is a line over which cars may be handled but not Southern Pacific; the United Railways could be used to haul the cars between the two terminals.

Q. If the United Railway lines that Mr. Parrington referred to were used to haul a carload of sugar from point of destination mentioned in plaintiff's complaint, through the Jefferson Street station, thence over

the United Railway lines, the Northern Pacific Terminal Lines, the O.-W. R. & N. Co. lines to St. Johns, what rates would apply?

A. It would be the rate to Jefferson Street.

Q. What rate would that be?

A. Well, at the present time—

Q. I mean what tariff would that rate be named on?

A. That would be rate named by Southern Pacific local tariff; I presume you are speaking of sugar now?

Q. Yes, carload of sugar.

A. Would be rate named by Southern Pacific local tariff. Taking San Francisco for illustration, 20 cents to Portland Jefferson Street.

Q. Is that 20 cents local or proportional rate?

A. That was local rate. I am taking for illustration San Francisco before the general increase just to illustrate.

Q. I want you to tell whether local, proportional or what kind of rates they are?

A. Would be local rates Southern Pacific to Jefferson Street, plus switching charges United Railways from Jefferson Street to their connection with the Northern Pacific Terminal Company, which I think is on Twelfth Street, North Twelfth Street, plus the local rate O.-W. R. & N. Company from Portland to St. Johns.

Q. Now, would the rate made up of these combinations be more or less than Southern Pacific Company's local rate to Portland and East Portland?

A. That would be higher, materially.

Q. So that in the case of a shipment moving as suggested by Mr. Parrington via the Jefferson Street station, and via West Portland and East Portland to St. Johns, there would be no fourth section departure at Portland?

A. No, sir; but the United Railways is not a party to the tariff, and under no conditions could the rates in this tariff be applied.

Q. Is the United Railways named in Tariff 1-B as one of the lines whose rates can be combined with the proportional rate for making total rate for some point beyond Portland?

A. No, sir.

Thereupon the witness was asked to explain the application of Rule 77 of the Interstate Commerce Commission, Circular 18-A, and over the objection of counsel for plaintiff testified as follows:

Pacific Freight Tariff Bureau 1-B, also Southern Pacific Local Tariff No. 729-Series, both carry on their face a clause to the effect that "by authority of Rule 77 of the Interstate Commerce Commission, Tariff Circular 18-a, rates on individual items"—making specific reference to Items 170 and 175 of Tariff 1-C and 165 and 170 of Tariff 1-B and 170 and 175 of Tariff 1-D,

and a similar rule in Tariff 729—continue “are not made applicable from or to, as the case may be, all intermediate points. Upon reasonable request therefor, rates which will not exceed those in effect to or from, as the case may be, more distant points will, under authority granted by the Interstate Commerce Commission, be established from or to, as the case may be, any intermediate point hereunder upon one day’s notice to the Commission and to the public.” These particular tariffs and referring specifically now to Tariffs 1-B, 1-C and 1-D, issued by F. W. Gomph, Agent, Pacific Freight Tariff Bureau, all carry through rates. These specify through rates from points in California to a specified destination without any reference to use of proportional rates or local rates to or from Portland and East Portland. These rates all carry, wherever the fourth section is not involved under a special order, by application reference to items mentioned on account of Rule 77. I would like to read one paragraph of Rule 77 of the Interstate Commerce Commission: “Tariffs should not contain volumes of unnecessary rates, and it is undesirable to require the posting of large numbers of tariffs at points from which no shipments are likely to move”—and a like ruling is carried, that is another section of this rule, “leading to points where shipments are not likely to move. Therefore until further orders carriers may file tariffs containing commodity rates applicable from known points of production without making such rates applicable from or to all intermediate points, which points should carry reference to Rule 77

on its title page." Now, this rule does not hold out the making of the fourth section rates to Portland or St. Johns at the intermediate points.

CROSS EXAMINATION

Questions by Mr. Wilson.

Under the O.-W. R. & N. Co.'s tariff, if a person had a permanent location on a switch track at St. Johns he could get sugar from San Francisco delivered there for less than a man located in Portland, but if a person were not permanently located on the switch track at St. Johns he would have to pay a higher rate than Portland.

The mere publication of a lower rate for a longer haul is not a violation of the fourth section of the Act to Regulate Commerce. If there is no movement of goods to the more distant point and no freight charges assessed or collected on the lower rate, there is no violation of the fourth section of the act.

Southern Pacific Company's terminal tariffs specifically set forth the Southern Pacific stations within the limits of the City of Portland and shows them to be Portland Park Street, East Portland and Portland Jefferson Street. The proportional rate published in Tariffs Nos. 1-B, 1-C, and 1-D are not applicable to shipments moving through or to Portland Jefferson Street station. The rates on commodities shipped from points in California to Portland Jefferson Street station are the same as the rate published to East Portland

station and to Portland Park Street station, but locally there are many variations in the rates named to these three stations. The Portland Jefferson Street station is not named in the tariff which carries the proportional rate.

The primary and original reason why the station of Portland was named in connection with the proportional rate was on account of the fact that the tariff provides for use of proportional rate in connection with local rates on the Northern Pacific Railway Company lines beyond Portland.

Shipments billed to Portland and placed there for delivery would be subject to the switching charge of the Northern Pacific Terminal Company and the local rate of the O.-W. R. & N. Co. if reconsigned from Portland to St. Johns. The proportional rate would not have been applicable for use in connection with such a shipment.

REDIRECT EXAMINATION.

Questions by Mr. Farrens.

The naming of Portland in Tariff 1-B for the purpose of permitting interchange with the Northern Pacific Railway Company on the proportional rate has existed at least twenty-five years to my knowledge. There has always been need for it and there always will be need for it.

TESTIMONY OF BEN C. DEY for
DEFENDANT

BEN C. DEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am a practicing attorney of this city and admitted to the bar of this state. I have been practicing 17 years, and have had experience with litigation growing out of rates and rate structure and freight charges. I am familiar with the issues involved in this case and with the work done by Mr. Wilson in the preparation and trial of this case. Five hundred dollars would be a fair attorney's fee.

TESTIMONY OF A. J. PARRINGTON,
PLAINTIFF

A. J. PARRINGTON, recalled on his own behalf, testified that he had procured from Meier & Frank Company an assignment in the exact words as the assignments procured from his other assignors, but that such assignment has been lost.

This testimony was received over the objection of counsel for the defendant that said assignment was not executed in the manner required by Section 3477 of the Revised Statutes of the United States. An exception was allowed by the court.

CROSS EXAMINATION

Questions by Mr. Farrens.

The witness testified that the assignment from

Meier & Frank Company was for the purpose of collection only.

After argument of counsel, Mr. Wilson, as counsel for plaintiff, submitted to the court a request for findings of fact, conclusions of law and judgment for the plaintiff in the manner following:

This matter coming on for trial on the 1st day of June, 1923, and evidence having been introduced in behalf of both parties, and arguments had on June first, fourth and fifth, 1923, before the court without a jury, a jury having been waived by both parties by stipulation in writing filed herein, the plaintiff appearing by James G. Wilson, his attorney, and the defendant appearing by Paul P. Farrens and A. M. Bull, of his attorneys, and the court having taken the matter under advisement until this time, and being fully advised, does now make the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT

I.

That the Southern Pacific Company is and was during all times mentioned in plaintiff's complaint, the owner of a line of railroad extending from the originating points mentioned in plaintiff's complaint to East Portland in the State of Oregon, and is and was the owner of a one-half interest in the railroad bridge extending from East Portland to Portland, Oregon, and is a joint lessee of the tracks and facilities of the North-

ern Pacific Terminal Company of Oregon in Portland, Oregon, has full rights of operating trains over said bridge and over the facilities and tracks of the Northern Pacific Terminal Company of Oregon, and has full rights to operate a line of railroad extending from said points of origin to all points reached by the tracks of the Northern Pacific Terminal Company of Oregon in the City of Portland, Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company at all times mentioned in the complaint was a joint lessee of the tracks and facilities of the Northern Pacific Terminal Company of Oregon, with operating rights thereover in the City of Portland, Oregon, was the owner of a one-half interest in the bridge across the Willamette River from Portland to East Portland, Oregon, with full operating rights thereover, and was the owner of a line of railroad from East Portland to St. Johns in the State of Oregon, and had full operating rights from all points reached by the Northern Pacific Terminal Company of Oregon's tracks in the City of Portland to St. Johns, Oregon.

III.

That the stations known as Portland, East Portland and St. Johns, are all within the State of Oregon and within the corporate limits of the City of Portland, Oregon.

IV.

That from and after twelve o'clock noon of De-

cember 28th, 1917, to midnight February, 1920, which period was known as the period of federal control, the United States Railroad Administration was in control of the lines of railroad of the Southern Pacific Company extending from the points of origin, designated in the complaint in California, to Portland, Oregon, including the operating rights of said Southern Pacific Company over the bridge across the Willamette River between East Portland and Portland, and the rights over the terminal facilities and tracks of the Northern Pacific Terminal Company of Oregon, and was likewise during said period in possession and control of the line of railroad of the Oregon-Washington Railroad & Navigation Company between the stations of Portland and St. Johns, including the rights of said company over the tracks and facilities of the Northern Pacific Terminal Company of Oregon and across said Willamette River bridge between Portland and East Portland, and also operating said lines in interstate commerce as a common carrier under authority of the United States and the Director General of Railroads, and pursuant to tariffs, rules and regulations for such purpose adopted and provided.

V.

That at the stations of East Portland, Oregon, and Portland, Oregon, the line of railroad of the Southern Pacific Company connects with the line of railroad of the Oregon-Washington Railroad & Navigation Company, and that prior to the period of Federal Control the Southern Pacific Company published and filed with

the Interstate Commerce Commission rates on sugar in carload lots of the minimum weight of 44,000 pounds to be applied on the transportation of sugar from San Francisco, Marysville, Hamilton, Crockett and other points designated in the tariff as Group 1 points, Alvarado, Salinas, Visalia and Betteravia to the stations of Portland and East Portland to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond Portland and East Portland, and that said rates so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1 points, were 13 cents per 100 pounds; from Salinas and Visalia, 20½ cents per 100 pounds; and from Betteravia, 23 cents per 100 pounds; and that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate so established to the local rate from Portland or East Portland established by the Oregon-Washington Railroad & Navigation Company from Portland or East Portland to point of destination, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's tariff No. 6-B, I. C. C. 283, effective March 15, 1914, and amendments and re-issues thereof; that in and by Supplement No. 57 of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1-B, I.C.C. 110, effective June 25, 1918, which was pub-

lished and filed with the Interstate Commerce Commission, said proportional rate from said points in California to Portland and East Portland was increased so that the rate from and after the 25th day of June, 1918, became 16½ cents per 100 pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado and Group 1 points to Portland and East Portland; 25½ cents per 100 pounds from Salinas and Visalia to Portland and East Portland; and 29 cents per 100 pounds from Betteravia to Portland and East Portland, which said rate was continued in effect by said supplement and re-issues of said tariff up to and subsequent to the termination of federal control.

VI.

That the Oregon-Washington Railroad & Navigation Company published and filed with the Interstate Commerce Commission its Local Tariff No. 6-B, I. C. C. No. 283, effective March 15, 1914, wherein, by Item 70, it established and put in effect the rate from its stations of Portland and East Portland to its station of St. Johns in the State of Oregon of 37½ cents per ton of 2,000 pounds, with a minimum charge of \$7.50 per car, which rate applied on sugar in carload lots; that said rate was continued in effect by said tariff and supplements and re-issues thereof up to and including the 30th day of December, 1919; that thereafter, in and by Supplement No. 23 of Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. No. 312, Item 60-G, published and filed with the Interstate Commerce Com-

mission, and made effective December 31st, 1919, the said carrier established a rate from its station of Portland to its station of St. Johns of \$7.50 per car, which had reference to note reading as follows:

“Applies only on freight interchanged with water carriers at St. Johns. Or., and when delivered to or received from railroad connections of O.-W. R. & N. at East Portland, Or., or Portland, Ore., in line haul movement. Will not apply on carload freight originating at or destined to points reached via O.-W.R. & N. Lines and its connections where line haul can be performed by O.-W. R. & N. Lines.”

That said tariff also continued in effect the rate of 37½ cents per 100 pounds between Portland, Oregon, and St. Johns, Oregon, without restriction, which said tariff continued in effect during the period of federal control; the court finds that the item providing for \$7.50 per car applied on shipments of sugar over the lines in question from points of origin to St. Johns, Oregon.

VII.

That the United States Railroad Administration adopted and continued in effect the rates of the Southern Pacific Company and the Oregon-Washington Railroad & Navigation Company established before the period of federal control, and in effect at the time of the inception of said federal control, and joined in and were parties to the said rates established during said control.

VIII.

That the station of St. Johns is more distant from San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas and Betteravia over the line of the Southern Pacific and Oregon-Washington Railroad & Navigation Company by the route over which said rates were established as hereinbefore found than the station of Portland, Oregon, or the station of East Portland, Oregon, and the haul over said route between said points of origin in California to Portland in the State of Oregon is included within the haul over said route from said point of origin in California to St. Johns in the State of Oregon, and is in the same direction and over the same line or route, and the haul to Portland and to East Portland in the State of Oregon over said route is included within the haul from said point of origin in California to St. Johns in the State of Oregon, and on all shipments over said route from Crockett, Port Costa (a point in Group 1), Alvarado and Salinas, from January 1st, 1918, to and inclusive of June 24th, 1918, the United States Railroad Administration charged and collected the sum of 23 cents per 100 pounds on sugar in carload lots; and from San Francisco to Portland charged and collected the sum of 20 cents per 100 pounds; and from Betteravia and Hamilton the sum of 25 cents per 100 pounds; and from Visalia the sum of 27½ cents per 100 pounds; and in addition thereto collected thereon war tax at the rate of three per cent of the transportation charge; and on all shipments between and inclusive of June 25th, 1918, and the end of federal

control said railroad administration charged and collected on said shipments in carload lots from Crockett, Port Costa, Alvarado and Salinas the sum of 29 cents per 100 pounds; from San Francisco 25 cents per 100 pounds; from Betteravia and Hamilton $31\frac{1}{2}$ cents per 100 pounds; together with a war tax of three per cent on the transportation charge.

IX.

That said charges were to the extent that the same exceeded the rate established and in effect from the various points in California to the station of St. Johns in the State of Oregon at the same time illegal and unlawful and charged without authority of law, and the exaction of the war tax on the excess of such charges of said rates from said respective points in California to St. Johns was illegal and unlawful and exacted without authority of law and in violation of Section 4 of the Act of Congress known as the Act to Regulate Commerce and amendments thereto, and that the only lawful rate in effect from January 1st, 1918, to and inclusive of June 24th, 1918, was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, $14\frac{7}{8}$ cents per 100 pounds; from Betteravia $24\frac{7}{8}$ cents per 100 pounds, and from Visalia and Salinas $22\frac{3}{8}$ cents per 100 pounds; plus a war tax of three per cent. upon the transportation charge; and that the only lawful rate to Portland or East Portland from June 25th, 1918, to and inclusive of December 30th, 1919, from the various points in California was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, $18\frac{3}{8}$ cents per 100 pounds; from Betteravia $30\frac{7}{8}$ cents per 100 pounds; and from Visalia and Salinas $27\frac{3}{8}$ cents per 100 pounds; plus a war tax of three per cent upon the transportation charge; and that the only lawful rate in effect to Portland or East Portland from said various points in California between the 31st day of December, 1919, and the end of federal control was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, $16\frac{1}{2}$ cents per 100 pounds, plus \$7.50 per car; from Betteravia 29 cents per 100 pounds, plus \$7.50 per car; and from Visalia and Salinas $25\frac{1}{2}$ cents per 100 pounds, plus \$7.50 per car; plus a war tax of three per cent upon the transportation charge.

X.

That the plaintiff's assignors shipped over the lines of the Southern Pacific from the points of origin shown, the shipments listed in the exhibits attached to the complaint and the stipulations amending the complaint filed in this cause, and paid to the United States Railroad Administration for such transportation, including war tax, the amount shown in the column headed "Freight, incl. war tax if any"; and the said United States Railroad Administration charged and collected the freight at the rate shown in the column headed "Rate", and the aggregate amount shown in the column headed "Freight, Inc. war tax if any"; that said collections were made on the dates shown in the column headed

"Date paid", and said shipments were made consigned to the persons shown at the head of each of said exhibits, and the freight was paid by such persons, and that each and all of said persons shown as consignees in said various exhibits paid to the United States Railroad Administration the freight charges on said various shipments shown in said column headed "freight, incl. war tax if any"; and that each and all of said consignees did, prior to the filing of said complaint and the stipulations amending said complaint, sell, transfer, and assign to the plaintiff their claims for the exaction by the United States Railroad Administraion for the transportation of said shipments, and the plaintiff is now the lawful owner and holder thereof; that the amount of said unlawful exaction, over and above the legal rate on the shipments so made, is the sum of Seven Thousand Eight Hundred Six Dollars and Five Cents (\$7,806.05).

XI.

That the court finds that a reasonable attorney's fee in this court for the collection of said claims is the sum of Seven Hundred and Fifty Dollars (\$750.00); said attorney's fee to cover only the work with reference to collection in this court and not on any appeal therefrom.

From the foregoing Findings of Fact the court makes the following

CONCLUSIONS OF LAW

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload lots from the various points of origin in California to Portland and East Portland were illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from said various originating points to St. Johns in the State of Oregon at the time of the movement of said respective shipments.

II.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between the said originating points and St. Johns at the time the respective shipments moved.

III.

That the plaintiff is entitled to judgment against the defendant for the sum of Seven Thousand Eight Hundred Six Dollars and Five Cents (\$7,806.05), together with interest at the rate of six (6) per cent per annum from June 1st, 1919, together with the sum of Seven Hundred and Fifty Dollars (\$750.00) attorney's fees, and plaintiff's costs and disbursements incurred herein.

Thereupon Mr. Farrens, as attorney for defendant, submitted in writing to the court the following objec-

tions to findings of fact and conclusions of law proposed and requested by plaintiff:

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the defendant and objects to and excepts to certain findings of fact and conclusions of law requested by the plaintiff as follows, to-wit:

I.

Defendant objects and excepts to finding of fact I, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

II.

Defendant objects and excepts to finding of fact II, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

III.

Defendant objects and excepts to finding of fact III, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objections, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

IV.

Defendant objects and excepts to finding of fact IV, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

V.

Defendant objects and excepts to finding of fact V and alleges the same to be immaterial to any proper or legal issue in this case, and that the same is not supported by the evidence, particularly with respect to that portion of the finding which recites that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate, so established, to the local rate from Portland or East Portland, established by the Oregon-Washington Railroad & Navigation Company from Portland or East Portland to point of destination, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's tariff No. 6-B, I. C. C. 283, effective March 15, 1914, and amendments and re-issues thereof.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

VI.

Defendant objects and excepts to finding of fact VI and alleges the same to be immaterial to any proper or legal issue in this case, and that the same is not supported by the evidence, particularly with respect to that portion of the finding which recites that the rate named in said finding applied to carload shipments of sugar over the lines in question from points of origin to St. Johns, Oregon, for the reason that the uncontroverted evidence showed that said rates were so restricted by tariff provisions as to be inapplicable to St. Johns, and further that no carload shipments of sugar were received at St. Johns during federal control of railroads.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

VII.

Defendant objects and excepts to finding of fact VII and alleges same to be immaterial to any proper or legal issue in this case, and that the same is not supported by the evidence.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

VIII.

Defendant objects and excepts to finding of fact VIII and alleges same to be immaterial to any proper or legal issue in this case, and that the same is contrary

to and not supported by the evidence, particularly with respect to that portion of the finding which recites that the station of Portland is intermediate to California points and St. Johns, Oregon, within the meaning of the short and long haul provision of the fourth section of the Act to Regulate Commerce, as amended.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

IX.

Defendant objects and excepts to finding of fact IX and alleges same to be immaterial to any proper or legal issue in this case, and that the same is contrary to and not supported by the evidence.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

X.

Defendant objects and excepts to that portion of finding of fact X, which recites that the consignees assigned their claims to plaintiff, that plaintiff is the lawful owner and holder of said claims, and that there was an exaction over and above the legal rate on the shipments, and alleges that said portion of said finding is contrary to and not supported by the evidence.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XI.

Defendant objects and excepts to finding of fact XI and alleges that the same is immaterial to any proper or legal issue in this case, and that since there were no overcharges no attorney's fee can be properly allowed, and avers that attorney's fees are not allowable against the defendant.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XII.

Defendant objects and excepts generally to said findings of fact for that said proposed findings of fact are specific in nature and yet fail to cover many of the issues made upon the pleadings and the evidence in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XIII.

Defendant objects and excepts to conclusion of law I, alleging same to be erroneous, and that a proper conclusion to be drawn from the facts is that the charges collected from plaintiff's alleged assignors were legal and not in violation of the amended fourth section of the Act to Regulate Commerce, and that the said rates

as collected were the only lawfully published and effective rates applicable to the shipments involved.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XIV.

Defendant objects and excepts to conclusion of law II, alleging same to be erroneous, and that a proper conclusion to be drawn from the facts is that the defendant is not liable to plaintiff in any amount whatsoever.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XV.

Defendant objects and excepts to conclusion of law IV, alleging same to be erroneous, and that the proper conclusion is that the defendant is entitled to a judgment against the defendant for his costs and disbursements.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XVI.

Defendant objects and excepts generally to a judg-

ment in favor of plaintiff for any sum of money and requests a judgment in favor of the defendant for the reason that the testimony properly supports such judgment.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

Thereupon Mr. Farrens, as attorney for defendant, submitted in writing to the court the following motion for special findings of fact and conclusions of law:

The evidence of the respective parties having been received by the court and no findings of fact, conclusions of law or judgment having been yet entered in this cause, now comes the defendant by its attorneys of record and moves the court to make the following specific findings of fact and specific conclusions of law in accordance with the evidence, to wit:

SPECIAL FINDINGS OF FACT.

I.

That the defendant is the duly appointed, qualified and acting agent of the United States Railroad Administration, appointed under Section 206-A of the Transportation Act of Congress of 1920, and has authority to represent said Railroad Administration in the defense of this action.

II.

That Southern Pacific Company was during all the times mentioned in plaintiff's complaint the owner or lessee of a line of railroad extending from the originating points mentioned in plaintiff's complaint to East Portland in the State of Oregon, and was the lessee of a one-half interest in the railroad bridge extending from East Portland to the west bank of the Willamette River in Portland, Oregon, and was a joint lessee of the tracks and facilities of Northern Pacific Terminal Company of Oregon in Portland, Oregon, which latter company on behalf of Southern Pacific Company received all carload freight from Southern Pacific Company destined to consignees located on tracks of Northern Pacific Terminal Company and delivered the same.

III.

That Oregon-Washington Railroad & Navigation Company at all times mentioned in plaintiff's complaint was a joint lessee of the tracks and facilities of Northern Pacific Terminal Company of Oregon, which said latter company on behalf of said Oregon-Washington Railroad & Navigation Company received from said Oregon-Washington Railroad & Navigation Company all carload freight destined for delivery to consignees located upon tracks of said Northern Pacific Terminal Company and delivered the same; that said Oregon Washington Railroad & Navigation Company was the owner of a line of railroad extending from East Portland to St. Johns, in the State of Oregon, and was the owner of a half interest in the bridge crossing the Wil-

lamette River from East Portland to the west bank of the Willamette River.

IV.

That the station known as East Portland is located within the corporate limits of the City of Portland, Oregon, on the easterly bank of the Willamette River; that the station known as St. Johns is located on the east bank of the Willamette River on the line of the Oregon-Washington Railroad & Navigation Company's railroad, and is several miles north of said station of East Portland; that the station of St. Johns is more distant from San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas and Betteravia over the line of Southern Pacific Company and Oregon-Washington Railroad Company than the station of East Portland, and that the haul over said lines of railroad between said points in California to East Portland is included within the haul over said lines of railroad to St. Johns and is in the same direction and over the same line or route, and that the haul to East Portland over said route is included within the haul from said points in California to St. Johns.

That the station of Portland is located on the west side of the Willamette River and is on the line of railroad of the Northern Pacific Terminal Company of Oregon; that the station of Portland is connected with the station of East Portland by a bridge constructed across the Willamette River at a cost of approximately \$....., and by the line of railroad of the

Northern Pacific Terminal Company of Oregon; that there are no physical railroad connections by the use of which shipments originating in California could be hauled via the lines of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company through Portland to the station of St. Johns; that in order to pass to or through the station of East Portland shipments originating at points in California and destined to St. Johns' Oregon, would have to be hauled from the station of East Portland over the bridge across the Willamette River to the west bank of the Willamette River, thence via the line of the Northern Pacific Terminal Company of Oregon to the station of Portland, thence returned in a back-haul movement via the line of the Northern Pacific Terminal Company of Oregon and across the bridge over the Willamette River to the station of East Portland, and thence northward over the line of the Oregon-Washington Railroad & Navigation Company to St. Johns; that the route from East Portland to Portland and return to East Portland, and the haul over the lines of railroad from East Portland to Portland and return to East Portland is not included within the haul from points in California to St. Johns, Oregon, and is not in the same direction and over the same line or route, and the haul from East Portland to Portland and return to East Portland is not included within the haul from points in California to St. Johns, Oregon; that the station of St. Johns, Oregon, is not more distant from the points in California named in plaintiff's complaint over lines

of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company than the station of Portland, and the haul over said route between said points in California to Portland is not included within the haul over said route to St. Johns, and is not in the same direction and over the same line or route.

V.

That from and after twelve o'clock noon of December 28, 1917, to midnight of February 29, 1920, which period was known as the period of federal control, the United States Railroad Administration was in control of the lines of railroad of Southern Pacific Company from the points of origin in California designated in the complaint to East Portland, Oregon, including the operating rights of said Southern Pacific Company over the bridge across the Willamette River between East Portland and the west bank of the Willamette River, and the rights over the terminal facilities and tracks of the Northern Pacific Terminal Company of Oregon, and was likewise during said period in possession and control of the line of railroad of Oregon-Washington Railroad & Navigation Company between the stations of East Portland and St. Johns, including the rights of said company in the bridge from East Portland across the Willamette River to the west bank of said river, and also including the rights of said company over the tracks and facilities of Northern Pacific Terminal Company of Oregon, and also operating said lines in interstate commerce as a common carrier under authority

of the United States and the Director General of Railroads, and pursuant to tariffs, rules and regulations for such purposes adopted, provided and initiated by the President of the United States acting by and through said Director General of Railroads.

VI.

That prior to the period of federal control Southern Pacific Company published and filed with the Interstate Commerce Commission rates on sugar in carload lots of the minimum weight of 44,000 pounds to be applied on the transportation of sugar from San Francisco, Marysville, Hamilton, Crockett and other points designated in the tariff as Group 1 points, Alvarado, Salinas and Visalia to the stations of Portland and East Portland to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond East Portland, and that said rates so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1 points, were 13 cents per 100 pounds; from Salinas and Visalia 20½ cents per 100 pounds; and that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate so established to the local rate from East Portland established by the Oregon-Washington Railroad & Navigation Company from East Portland to the point of destina-

tion, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's tariff No. 6-B, I. C. C. 283, effective March 14, 1914, and amendments and re-issues thereof; that in and by Supplement No. 57 of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1-B, I. C. C. 110, effective June 25, 1918, which was published and filed with the Interstate Commerce Commission, said proportional rate from points in California to Portland and East Portland were so increased that the rate from and after the 25th day of June, 1918, became $16\frac{1}{2}$ cents per 100 pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado and Group 1 points to Portland and East Portland and $25\frac{1}{2}$ cents per 100 pounds from Salinas and Visalia to Portland and East Portland, which said rates were continued in effect by said supplement and re-issues of said tariff up to the termination of federal control.

VII.

That the Oregon-Washington Railroad & Navigation Company published and filed with the Interstate Commerce Commission its local tariff No. 6-B, I. C. C. No. 283, effective March 15, 1914, wherein by Item 70 it established and put in effect a rate from the stations of Portland and East Portland to its station of St. Johns in the State of Oregon, of $37\frac{1}{2}$ cents per ton of 2000 pounds, with a minimum charge of \$7.50 per car, which rate applied on sugar in carload lots, and said local tariff No. 6-B and all supplements and re-issues

thereof in effect during the period of federal control of railroads contained an item numbered 1, wherein and whereby it was provided as follows:

“Subject, application to and from connecting lines.

“Terminal facilities provided by this Company are intended and required for its own business, in view of which, and the practice generally prevailing with respect to the use of terminal facilities, on rates named herein, will not apply to or from team tracks on freight received from or delivered to connecting lines.

“NOTE:—Freight will not be accepted at or delivered to warehouse or industry tracks when for interchange with connecting carriers, unless shipped by or consigned to parties permanently located on such warehouse or industry tracks.”

And the court further finds that during the period of federal control of railroads there were no parties located at St. Johns, Oregon, on warehouse or industry tracks by whom freight could have been shipped or to whom freight could have been consigned.

That the rate named in the tariff last above mentioned was continued in effect by said tariff and supplements and re-issues thereof up to and including the 30th day of December, 1919; that thereafter, in and by Supplement No. 23 of Oregon-Washington Rail-

road & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. No. 312, which tariff was initiated, published and filed with the Interstate Commerce Commission by the President of the United States, acting through the Director General of Railroads, and made effective December 31, 1919, the said defendant established a rate from its station at Portland to its station at St. Johns of 37½ cents per 100 pounds, and that said last mentioned tariff by its Item 60-G established a rate from the station of Portland to the station of St. Johns of \$7.50 per car, subject to a condition expressed in said item in words and figures as follows:

“Applies only on freight interchanged with water carriers at St. Johns, Ore., and when delivered to or received from railroad connections of O.-W. R. & N. at East Portland, Ore. or Portland, Ore. in line haul movement. Will not apply on carload freight originating at and destined to points reached via O.-W. R. & N. lines and its connections where line haul can be performed by O.-W. R. & N. lines.”

And the court further finds that said item providing for \$7.50 per car was not applicable on shipments of sugar over the lines in question from points of origin to St. Johns, Oregon, as a point of ultimate destination.

VIII.

That from the time of the commencement of federal control until and including June 24, 1918, S. P. Tariff

No. 729-B, I. C. C. No. 3659, was lawfully published and in effect, and Item 102-A of said tariff provided rates on sugar in carload lots to Portland and East Portland, Oregon, as follows: From San Francisco, California, 20 cents per 100 pounds; from Alvarado, Crockett and Salinas, California, 23 cents per 100 pounds; from Hamilton and Betteravia, California, 25 cents per 100 pounds, and from Visalia, California, 27½ cents per 100 pounds.

That from June 25, 1918, until the termination of federal control of railroads the lawfully published and effective tariff was S. P. Tariff No. 729-C, I. C. C. No. 4092, and that Item No. 1870 of said tariff provided rates on sugar in carloads to Portland and East Portland as follows: From San Francisco, California, 25 cents per 100 pounds; from Alvarado, Crockett and Salinas, California, 29c per 100 pounds; from Hamilton and Betteravia, California, 31½ cents per 100 pounds, and from Visalia, California, 34½ cents per 100 pounds.

That the above mentioned freight rates were the only lawfully published and effective freight rates applicable on sugar in carload lots from the points of origin above mentioned to the points of destination above mentioned during the period of federal control of railroads, and that said rates were collected by defendant from the consignees mentioned in plaintiff's complaint on all shipments described in said complaint and the stipulations amending the same.

IX.

That O.-W. R. & N. Co. Tariff No. 2-A, I. C. C. No. 107, effective March 25, 1912, and North Pacific Coast Freight Bureau Tariff No. 2, S. J. Henry, Agent, I. C. C. No. 18, effective December 31, 1919, were the only lawfully published and effective tariffs covering the transportation of sugar from the stations of Portland and East Portland and the station of St. Johns, Oregon, and that said tariffs named a rate on sugar in carload lots from Portland, Oregon, to St. Johns, Oregon, of 7 cents per 100 pounds, which rate remained in effect from the commencement of federal control of railroads until June 25, 1918, on which date application of the Director General's Order No. 28 raised said rate to the sum of 9 cents per 100 pounds, which rate remained in effect until termination of Federal Control.

X.

That the President of the United States, acting through the Director General of Railroads, adopted, initiated and continued in effect the rates of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company established before the period of federal control, and in effect at the time of the inception of federal control, and initiated and established all rates which were published during federal control.

XI.

That no carload shipments of sugar were received at the station of St. Johns during the period of federal control of railroads.

XII.

That the station of Betteravia was and is located exclusively on the line of railroad of the Santa Maria Valley Railroad Company, which said railroad company was not under federal control.

XIII.

That all carload shipments of sugar mentioned in plaintiff's complaint to Wadhams & Kerr Bros. were delivered to said Wadhams & Kerr Bros. at Thirteenth and Davis Streets in the City of Portland, on lines of the Spokane, Portland & Seattle Railway Company at a point beyond the station of Portland and beyond the line of the Northern Pacific Terminal Company of Oregon.

XIV.

That all shipments of sugar mentioned in plaintiff's complaint as received by Allen & Lewis Company were delivered to said company at a point on the line of railroad of the United Railways Company, which said point was beyond the station of Portland and more distant from the station of East Portland than the station of Portland; and that the haul from California points to said point on said United Railways Company's line is not included within the haul from said California points to St. Johns and is not in the same direction or over the same line or route; and that said United Railways Company's line was not under federal control at any time after June 26, 1918.

XV.

That none of the assignments executed by the consignees named in the complaint in favor of the plaintiff were executed with the formalities required by Section 3477 of the Revised Statutes of the United States, and that no United States treasury warrant for the payment of said choses in action had been issued at or prior to the time of the execution of any of said assignments.

XVI.

That the various consignees named in plaintiff's complaint and the stipulations amending the same received from the points of origin the shipments listed in the exhibits attached to the complaint and the stipulations amending the complaint, and paid to the United States Railroad Administration for such transportation, including war tax, the amounts shown in the column headed "Freight, incl. war tax if any"; and the defendant charged and collected the freight at the rate shown in the column headed "Rate", and the aggregate amount in the column headed "Freight, inc. war tax if any"; that said collections were made on the dates shown in the column headed "Date paid" and said shipments were consigned to the persons shown at the head of each of said exhibits and the freight was paid by such person.

And the defendant further moves the court to make the following

CONCLUSIONS OF LAW.

I.

That the charges collected from the consignees named in plaintiff's complaint and amendments thereto were in accord with the only true, lawful, published and effective rates in effect during the period of federal control, covering the transportation of sugar in carload lots from the various points of origin in California to Portland and East Portland.

II.

That none of the tariffs covering transportation of sugar in carload lots between points of origin and points of destination mentioned in plaintiff's complaint created departures from the amended fourth section of the Act to Regulate Commerce.

III.

That the assignments executed by the consignees mentioned in plaintiff's complaint and stipulations amending the complaint, in favor of the plaintiff, were void and of no effect, and that the plaintiff is not the owner of the choses in action alleged in said complaint and the amendments thereto.

IV.

That neither the plaintiff nor any of the consignees named in plaintiff's complaint and the amendments thereto suffered any damage or loss by reason of any of the facts alleged in said complaint and amendments thereto.

V.

That the statute of limitations provided for in the Act to Regulate Commerce, as amended, has destroyed all liability with respect to all claims mentioned in plaintiff's complaint, and amendments thereto, on which freight charges were paid more than two years prior to the date on which this action was commenced, to-wit, all claims on which freight charges were paid prior to the 16th day of September, 1919.

VI.

That the Interstate Commerce Commission has exclusive original jurisdiction in this action, and that this court has no jurisdiction of the subject matter of this action.

VII.

That the Director General of Railroads was not, at any time mentioned in plaintiff's complaint or amendments thereto, and is not now, amenable to the long and short haul provision of the fourth section of the Act to Regulate Commerce, as amended.

VIII.

That a judgment against the defendant in conformity with the prayer of the complaint, or a judgment for any sum of money whatsoever on the causes of action alleged in the complaint would amount to the execution of a penalty from the United States government.

IX.

That the complaint herein should be dismissed and defendant have judgment against plaintiff for his costs and disbursements herein.

The court thereupon overruled the defendant's motion for special findings of fact and conclusions of law, as to each and every such requested special finding and conclusion, to which ruling the defendant duly excepted, and such exceptions were allowed by the court.

Thereupon the court signed the findings of fact and conclusions of law requested by the plaintiff and ordered same filed as the decision of the court in said cause, to which ruling of the court counsel for defendant excepted and exception was duly allowed.

Whereupon a judgment was entered for the plaintiff and against the defendant as follows:

This matter coming on on application of the plaintiff for entry of judgment in the above entitled cause, plaintiff appearing by his attorney, James G. Wilson, and the defendant appearing by Paul P. Farrens and A. M. Bull, of its attorneys, and the court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises,

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant, James C. Davis, Agent United States Railroad Administration, judgment in the sum of Seven Thou-

sand Eight Hundred Six Dollars and Five Cents (\$7,806.05), together with interest at the rate of six (6) per cent per annum from the first day of June, A. D. 1919, and the sum of Seven Hundred and Fifty Dollars (\$750.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements herein taxed and allowed in the sum of \$.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant pay said sum promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open court this 19th day of July, A. D. 1923.

Upon the date of the making and entry of said judgment, to-wit, on the 19th day of July, 1923, the following stipulation was entered into between the attorneys of record for plaintiff and defendant and filed with the clerk of the court, to-wit:

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, acting through their respective attorneys of record, that the defendant may have to and including the 15th day of September, 1923, within which to serve and tender his bill of exceptions.

Thereupon on the 19th day of July, 1923, the court entered an order as follows, to-wit:

Pursuant to the stipulation of the parties hereto, IT IS HEREBY ORDERED AND ADJUDGED

that defendant may have to and including September 15, 1923, within which to serve and tender his bill of exceptions herein.

And now, because the foregoing matters and things are not of record in this case, I, Robert S. Bean, District Judge, and the Judge trying the above entitled action in the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above entitled action, and contains all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with the rulings of the court on the questions of law presented, and that exceptions taken by the defendant therein were duly taken and allowed, and that said bill of exceptions was duly prepared and submitted within the time allowed by the rules of this court as extended by stipulation of the parties and the order of this court duly made and entered in accordance with the provisions of such stipulation, and is now signed and settled as and for the bill of exceptions in the above entitled action, and same is ordered made a part of the record in said action.

R. S. BEAN,
Judge.

It is hereby ordered that the original exhibits referred to in the above bill of exceptions, as being attached thereto, be attached to this bill of exceptions and made a part thereof.

R. S. BEAN,
Judge.

That on the 30th day of October, 1923, there was duly served and filed in said Court the following

PETITION FOR WRIT OF ERROR.

James C. Davis, Director General, as agent United States Railroad Administration (Southern Pacific Company), defendant in the above entitled action, conceiving himself aggrieved by the final order and judgment in this court made and entered against him and in favor of the plaintiff on the 19th day of July, 1923, and the findings of fact and conclusions of law in said cause made, and the objections severally taken thereto, and the rulings of the court thereon, as set forth in his assignments of error filed herein, petitions said court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, under and in accordance with the rules of the United States Circuit Court of Appeals in that behalf made and provided:

Also that an order be made fixing the amount of security which the defendant shall give and furnish in said writ of error, and that upon giving such security all further proceedings in this court be stayed until the dismissal of said writ of error by the United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error as above, to the great damage of the defendant herein.

The defendant has filed herewith his assignments of error upon which he relies and will urge in the said United States Circuit Court of Appeals.

WHEREFORE, defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this court for the correction of the errors so complained of, and that a transcript of the record of proceedings, papers, and all things concerning same, upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit to the end that said judgment be reversed and that defendant recover judgment as demanded in his answer.

A. M. BULL,

PAUL P. FARRENS,

Attorneys for Defendant.

And on the 30th day of October, 1923, there was duly served and filed the following

ASSIGNMENTS OF ERROR.

Comes now the defendant above named, appearing by A. M. Bull and Paul P. Farrens, his attorneys of record, and says that the judgment and final order of this court, made and entered in the above entitled court on the 19th day of July, 1923, in favor of the plaintiff above named and against the defendant above named, is erroneous and against the just rights of the defendant, and files herein, together with his petition for writ

of error from said judgment and order, the following assignments of error which he avers occurred upon the trial of said cause.

(In view of the fact that in respect of some of the assignments hereinafter set forth, the bill of exceptions does not disclose the express saving of an exception, attention is directed to the ruling of the court relative to the saving of exceptions, as follows:

“MR. FARRENS: If the court please, in those instances where evidence is permitted to go in, either in counsel’s case in chief or in my case in chief later on, may it always be understood, where objection has been made, that we have asked for an exception, and that it has been granted?

THE COURT: That may be understood, yes, the case is being tried before the court and I don’t wish the testimony stricken out.”) (Bill of Exceptions, page —, *supra*.)

I.

The court erred in overruling and in not sustaining defendant’s demurrer to plaintiff’s amended complaint.

II.

The court erred in sustaining and in not overruling plaintiff’s demurrer to defendant’s affirmative answer and defense.

III.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibits 7 and 8, the same being alleged assignments of the claims of Wadhams & Kerr Brothers Company to the plaintiff, the objection thereto being that said alleged assignments were void because contrary to the provisions of Section 3477, Revised Statutes of the United States. (Bill of Exceptions, page —, *supra*.)

IV.

The court erred in refusing, over the objection and exception of the defendant, to permit plaintiff's witness, Frank Kerr, Secretary of Wadhams & Kerr Brothers Company, one of plaintiff's assignors, to answer on cross examination the following question:

"You were not afterwards reimbursed by any one else for any part of these freight charges?" (Bill of Exceptions, page . . , *supra*.)

V.

The court erred in refusing, over the objection and exception of the defendant, to permit plaintiff's witness, Frank Kerr, Secretary of Wadhams & Kerr Brothers Company, one of plaintiff's assignors, on cross examination to answer an interrogatory as to whether or not said Wadhams & Kerr Brothers Company had sold its shipments of sugar involved in this case at a price which would produce the maximum profit allowed by the United States Food Administration, all of which

is more fully illustrated by the following extract taken from the bill of exceptions.

"MR. FARRENS: Now, during the period of federal control of railroads, the United States Food Administration limited the profit that you made on the sale of sugar in this city, didn't they?

A. Yes, sir.

Q. Can you say whether or not your company sold the shipments of sugar which are credited to your company in this complaint for a price which was equal to the maximum profit allowed?

MR. WILSON: I object to that as immaterial.

THE COURT: What has that to do with this case? The right to recover on this freight?

MR. FARRENS: If the court please, I don't know what view your Honor takes of the measure of damages in this case. But in the Intermountain Coal case the United States Supreme Court has indicated, and the Interstate Commerce Commission has always, without exception, ruled that a violation of the fourth section of the Interstate Commerce Commission Act didn't mean that the difference between any two sets of rates was the measure of damages. The plaintiff must prove that he was damaged, that he has personally suffered injury; not a mere technical question of subtracting one rate from the other is the measure of damages. This is not an overcharge case, this is a damage case.

THE COURT: I thought the courts held that the measure of damages is the difference in freight.

MR. WILSON: The Circuit Court of Appeals has, and your Honor held it; this International case referred to is a rebate case.

THE COURT: That is already settled so far as this district is concerned.

MR. FARRENS: Exception saved." (Bill of Exceptions, page —, *supra*.)

VI.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 12, the same being alleged assignment of the claim of Starr Fruit Products Company to the plaintiff, the objection thereto being that said alleged assignment is void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page —, *supra*.)

VII.

The court erred in admitting in evidence, over the objection and exception of defendant, such portions of plaintiff's exhibit 11 as consisted of freight bills which disclosed on their face that payments were made more than two years prior to the date of the commencement of the action, the nature of said exception being more fully illustrated by the following extract from the bill of exceptions:

"MR. WILSON: I hand you herewith a number of freight receipts, and ask you who paid the freight shown on these receipts?

A. The Starr Fruit Products Company.

MR. WILSON: I offer it in evidence.

MR. FARRENS: I desire at this time to object to the introduction of such of these freight bills in evidence as disclose on their face that payments were made more than two years prior to the date of the complaint filed in this case.

THE COURT: That on the theory barred by the statute?

MR. FARRENS: Yes, under the decision of the United States Supreme Court in the case of K. C. & C. Ry. vs. Wolfe.

THE COURT: Put them in subject to the objection.

MR. FARRENS: Save an exception."

"(The exception was duly allowed and the freight receipts were admitted in evidence and marked plaintiff's Exhibit 11.)"

(Bill of Exceptions, page —, *supra*.)

VIII.

The court erred in refusing, over the objection and exception of the defendant, to allow defendant's motion to strike from the files those portions of plaintiff's Ex-

hibit 6 which reflect freight charges paid more than two years prior to the commencement of the action, which is more fully illustrated by the following extract from the bill of exceptions:

MR. FARRENS: (Referring to all of plaintiff's exhibits respecting freight charges paid more than two years prior to the commencement of action.) In order to make a record I would like to make the same motion based on the statute of limitations as made with respect to the exhibits offered by the witness, Mr. Kerr, of Wadhams & Kerr, namely, that those exhibits be stricken from the files in this case.

THE COURT: You will be entitled to urge that on the final argument as to all items that are barred by the statute."

(Bill of Exceptions, page —, *supra*.)

IX.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 13, the same being a freight bill showing that Lang & Company, one of the plaintiff's assignors, has paid the freight charges shown on said bill more than two years prior to the commencement of this action, the objection thereto being that recovery thereon was barred by the statute of limitations. (Bill of Exceptions, page —, *supra*.)

X.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 14, the same being alleged assignment of the claim of Lang & Company to the plaintiff, the objection thereto being that said alleged claim is void because contrary to the provisions of Section 3477, Revised Statutes of the United States. (Bill of Exceptions, page —, *supra*.)

XI.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 15, said objection running to such of the freight bills included within said Exhibit, which showed on their face that freight charges had been paid more than two years prior to the commencement of the action, and that said claims were therefore barred by the statute of limitations. (Bill of Exceptions, page —, *supra*.)

XII.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 16, the same being alleged assignment of the claim of Mason, Ehrman & Company to the plaintiff, the objection thereto being that said alleged assignment is void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page —, *supra*.)

XIII.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 17, said objection running to one of the freight bills included in said exhibit which showed on its face that the freight charges therein referred to had been paid more than two years prior to the commencement of this action, and that the claim thereon was barred by the statute of limitations. (Bill of Exceptions, page —, *supra*.)

XIV.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 18, the same being alleged assignment of the claim of Tru-Blu Biscuit Company to the plaintiff, the objection thereto being that said alleged assignment is void because contrary to the provisions of Section 3477, Revised Statutes of the United States. (Bill of Exceptions, page —, *supra*.)

XV.

The court erred in admitting in evidence, over the objection and exception of defendant, one of the freight bills included in plaintiff's Exhibit 19, which showed on its face that the charges therein referred to had been paid more than two years prior to the commencement of this action, and that the claim thereon was barred by the statute of limitations. (Bill of Exceptions, page —, *supra*.)

XVI.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 20, the same being alleged assignment of the claim of Wadhams & Company to the plaintiff, the objection thereto being that said alleged assignment is void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page —, *supra*.)

XVII.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 23, consisting of two freight bills paid by Meier & Frank Company, one of plaintiff's assignors, more than two years prior to the commencement of this action, the objection thereto being that the claims thereon were barred by the statute of limitations. (Bill of Exceptions, page —, *supra*.)

XVIII.

The court erred in refusing, over the objection and exception of the defendant, to allow defendant's motion to strike from the record certain testimony given by the plaintiff at variance with his complaint, the character of the ruling and exception being more fully illustrated by the following extract from the bill of exceptions.

“Tariff No. 6 and the reissues thereof provide a switching rate from Portland or East Portland

to St. Johns. The switching rate on sugar from Portland and East Portland to St. Johns, under Tariff 6-C, was thirty-seven and one-half cents per ton of 2000 pounds, minimum carload 20 tons. The same item, 60-G, in this switch tariff, carries a rate between St. Johns and Portland of \$7.50 per car, and between St. Johns and East Portland of \$5.00 per car, subject, however, to a provision as follows: 'Applies only on freight interchanged with water carriers at St. Johns, Oregon, and when delivered to or received from railroad connection of O.-W. R. & N. at East Portland or at Portland, Oregon, in line haul movement.' The witness then gave testimony tending to prove that if the ruling last above quoted prevented the switching rate of \$7.50 and \$5 per car from being applicable between Portland and East Portland and St. Johns, the switch tariff nevertheless carries a thirty-seven and one-half cent per ton rate, which was not so limited, and thereupon the following proceedings were had:

MR. FARRENS: Objected to because counsel is now trying to prove a different measure of damages or different rate than alleged in the complaint.

MR. WILSON: No, I am not. I would like your Honor to take a look at this tariff.

MR. FARRENS: My objection has nothing to do with the truth or falsity of the statement as

just made, but I call your attention to the fact that the 6th paragraph of the complaint alleges a measure of damages and makes a statement as to the rates in existence from December 31, 1919, to the end of the federal control, says that by Supplement No. 27 of the O.-W. R. & N. Co. Local Freight Tariff No. 6-C, I. C. C. 312, Item 60-G, a certain rate was in effect; a rate of \$7.50 per car; and further on in his complaint he alleges that this is the measure of his damages, the difference between what was paid and that proportional rate plus \$7.50 per car. Now, I contend that he is trying to introduce evidence to support an allegation which is in variance with his complaint, and which would tend to support a different measure of damages than that which he has alleged.

MR. WILSON: If there is any doubt in your Honor's mind, the evidence having been introduced without objection, I would like leave to amend the complaint to conform with the proof.

MR. FARRENS: As far as the introduction of the evidence without objection, the type of counsel's question was such as to give me no warning what he was intending to elicit from the witness. Had I known, I would have objected and I move now to strike from the record.

THE COURT: Let the record remain.

MR. WILSON: As a matter of fact, I don't concede. I am saying that according to his inter-

pretation of that paragraph; I don't give it the same interpretation he does. I say it does apply. He is wanting, your Honor, to make it apply in only one instance, and I say the case is susceptible of application in two instances, to wit, both when the shipment is received from water carrier and also when it is in connection with line haul of connecting carrier, because otherwise they wouldn't put in the clause 'when' after the word 'and' if it were to be in one instance only. Now, it says when received from ship and when it is in connection with line haul. But I say if there is any doubt in your Honor's mind that the 37½ cents per ton still applies instead of the \$7.50 per car applying prior to the issuance of this tariff.

MR. FARRENS: If the court please, in those instances where evidence is permitted to go in, either in counsel's case in chief or in my case in chief later on, may it be always understood where objection has been made, that we have asked for an exception, and that it has been granted.

THE COURT: That may be understood, yes. The case is being tried before the court and I don't wish the testimony stricken out." (Bill of Exceptions, page . . ., *supra*.)

XIX.

The court erred in permitting counsel for plaintiff to testify, over the objection and exception of the de-

fendant, that \$1200.00 was a reasonable attorney's fee to be allowed the plaintiff in this case, said objection being that attorney's fees were not allowable against the Director General of Railroads nor the United States government. (Bill of Exceptions, page . . . , *supra.*)

XX.

The court erred in permitting cross examination of the witness J. N. Harney relative to the receipt of a carload shipment of sugar at St. Johns on August 10, 1921, and the collection thereon of freight charges on the basis of the proportional rate to Portland plus the switching charge to St. Johns, all of which testimony was received over the objection and exception of defendant, to the effect that said testimony was irrelevant because the shipment referred to was made and switching charges thereon collected subsequent to the termination of federal control of railroads. (Bill of Exceptions, page . . . , *supra.*)

XXI.

The court erred in admitting in evidence, over the objection and exception of the defendant, proof of the execution of an alleged assignment of the claim of Meier & Frank Company to the plaintiff, the objection thereto being that said alleged assignment was void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page . . . , *supra.*)

XXII.

The court erred in overruling defendant's objection to finding of fact I and in not sustaining said objection for the reasons therein stated.

XXIII.

The court erred in overruling defendant's objection to finding of fact II and in not sustaining said objection for the reasons therein stated.

XXIV.

The court erred in overruling defendant's objection to finding of fact III and in not sustaining said objection for the reasons therein stated.

XXV.

The court erred in overruling defendant's objection to finding of fact IV and in not sustaining said objection for the reasons therein stated.

XXVI.

The court erred in overruling defendant's objection to finding of fact V and in not sustaining said objection for the reasons therein stated.

XXVII.

The court erred in overruling defendant's objection to finding of fact VI and in not sustaining said objection for the reasons therein stated.

XXVIII.

The court erred in overruling defendant's objection to finding of fact VII and in not sustaining said objection for the reasons therein stated.

XXIX.

The court erred in overruling defendant's objection to finding of fact VIII and in not sustaining said objection for the reasons therein stated.

XXX.

The court erred in overruling defendant's objection to finding of fact IX and in not sustaining said objection for the reasons therein stated.

XXXI.

The court erred in overruling defendant's objection to finding of fact X and in not sustaining said objection for the reasons therein stated.

XXXII.

The court erred in overruling defendant's objection to the effect that the findings of fact, while purporting to be specific in nature, nevertheless fail to cover many of the issues upon the pleadings and the evidence in the case.

XXXIII.

The court erred in overruling defendant's objection to conclusion of law I and in failing to conclude that

the charges collected from plaintiff's alleged assignors were legal and not in violation of the amended fourth section of the Act to Regulate Commerce, and that the said rates as collected were the only lawfully published and effective rates applicable to the shipments involved.

XXXIV.

The court erred in overruling defendant's objection to conclusion of law II and in failing to conclude that the defendant is not liable to plaintiff in any sum of money whatsoever.

XXXV.

The court erred in overruling defendant's objection to conclusion of law IV and in failing to conclude that the defendant is entitled to a judgment against the plaintiff for costs and disbursements.

XXXVI.

The court erred in overruling defendant's general objection to a judgment in favor of plaintiff and in refusing defendant's request for a judgment in favor of the defendant, for the reason that the testimony properly supported a judgment in favor of the defendant.

XXXVII.

The court erred in overruling defendant's motion for special findings of fact and conclusions of law, and that the refusal as to each and every such special finding of fact and conclusion of law was separate error

committed by the court over the objection and exception of the defendant.

XXXVIII.

The court erred in entering judgment in favor of the plaintiff and against the defendant because the findings of fact and conclusions of law which the court filed as its decision in this case did not support such a judgment.

XXXIX.

WHEREFORE, the said defendant and plaintiff in error prays that the judgment of the District Court of the United States, for the District of Oregon, be reversed, with directions to the District Court to enter a judgment in favor of the defendant.

A. M. BULL,
PAUL P. FARRENS,
Attorneys for Defendant.

That on said 30th day of October, 1923, there was duly served and filed in said Court and approved by the Judge of said Court the following

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, that JAMES C. DAVIS, Director General, as agent United States Railroad Administration, principal, and UNITED STATES FIDELITY & GUARANTY COMPANY a Maryland corporation, as surety, are held and firmly bound unto A. J. Parrington, plaintiff

herein, in the sum of \$10,000.00, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seals and dated the 30th day of October, 1923.

WHEREAS, the above named James C. Davis, Director General, as agent United States Railroad Administration, has prosecuted a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment in the above entitled cause of the District Court of the United States for the District of Oregon, entered on the 19th day of July, 1923;

NOW, the conditions of this obligation are such that if the above named James C. Davis, Director General, as agent United States Railroad Administration, defendant, shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good this plea, then this obligation to be void, otherwise to be and remain in full force and effect.

JAMES C. DAVIS,
Director General, as Agent United States Railroad
Administration.

By PAUL P. FARRENS,
One of His Attorneys.

UNITED STATES FIDELTY & GUARANTY
COMPANY,

By DOUGLAS R. TATE,
Its Attorney in Fact.

Examined and approved this 30th day of October, 1923.

R. S. BEAN, District Judge.

And on said 30th day of October, 1923, there was duly made and entered the following

ORDER ALLOWING WRIT OF ERROR.

Now on this 30th day of October, 1923, came the defendant above named, James C. Davis, Director General, as agent United States Railroad Administration (Southern Pacific Company), appearing by Paul P. Farrens, one of his attorneys of record herein, and filed herein and presented to the court his petition praying for an allowance of a writ of error from the decision and judgment of this court made and entered on the 19th day of July, 1923, in favor of the plaintiff above named against said defendant, and the findings of fact and conclusions of law made or refused on the trial of the above entitled cause, out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this court, together with certain assignments of error intended to be urged by him within due time.

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which the defendant shall give and

furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

NOW, THEREFORE, in consideration thereof this court does allow said writ of error upon said defendant filing with the clerk of this court a good and sufficient bond in the sum of \$10,000.00, to the effect that said defendant, James C. Davis, Director General, as agent United States Railroad Administration (Southern Pacific Company), shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the court, and it is ordered that all proceedings in this court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bonds shall operate as a supersedeas bond.

Dated this 30th day of October, 1923.

R. S. BEAN, Judge.

And on the said 30th day of October, 1923, there was filed the following

**STIPULATION FOR ORDER DIRECTING
TRANSMISSION OF ORIGINAL
EXHIBITS.**

IT IS STIPULATED AND AGREED by and between counsel for the respective parties that copies of the original exhibits physically attached to the bill of exceptions may be omitted from the certified copy of the record, and that the clerk of this court may except such exhibits from the effect of his certificate.

IT IS FURTHER STIPULATED that said original exhibits physically attached to the bill of exceptions shall be ordered to be transmitted with the certified transcript of the record to the United States Circuit Court of Appeals for the Ninth Circuit, and that thereafter either party may cause any other and additional original exhibits to be transmitted by the clerk of the District Court of the United States, for the District of Oregon, to the United States Circuit Court of Appeals, for the Ninth Circuit.

PAUL P. FARRENS,

Of Attorneys for Defendant and Plaintiff in Error.

JAMES G. WILSON,

Of Attorneys for Plaintiff and Defendant in Error.

Dated October 30th, 1923.

And on said 30th day of October, 1923, there was made and entered the following

ORDER.

Pursuant to the stipulation of the parties hereto, it is hereby ORDERED AND ADJUDGED that the

clerk of this court shall transmit with a certified copy of the record in this cause the original exhibits which are physically attached to the bill of exceptions, and that thereafter either party may cause such other and additional original exhibits as he may desire to be forwarded by the clerk of this court to the United States Circuit Court of Appeals.

R. S. BEAN, Judge.

On said 30th day of October, 1923, there was filed the following

**STIPULATION RE CERTIFICATION BY
CLERK.**

Attorneys for plaintiff in error herein having prepared and compared with the original record the within printed transcript,

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties to the within proceedings for a writ of error, by and through their respective attorneys, that the within printed record tendered to the Clerk of the United States District Court, for the District of Oregon, for his certificate, is a true transcript of the record in the within cause, and that the clerk of the said court shall certify the said transcript without comparison thereof with the original record.

PAUL P. FARRENS,

Of Attorneys for Plaintiff in Error.

JAMES G. WILSON,

Of Attorneys for Defendant in Error.

That on the 31st day of October, 1923, there was filed the following

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED between the parties hereto, by their respective attorneys of record, that in printing the transcript of record on writ of error in said cause the caption, title and clerk's endorsements of filing of papers and other formal matters may be omitted and that said transcript of record in said cause shall consist of the following:

1. Amended complaint (with statement of the date of filing of original complaint).
2. Amended stipulation amending complaint.
3. Demurrer to amended complaint.
4. Minutes of Court, January 23, 1923. Memorandum opinion.
5. Minutes of Court, January 22, 1923. Order overruling demurrer.
6. Answer to amended complaint.
7. Demurrer to answer.
8. Minutes of Court, February 5, 1923. Order sustaining demurrer.
9. Minutes of Court, February 5, 1923. Memorandum opinion.
10. Notice for re-argument of demurrer to answer.

11. Findings of fact and conclusions of law.
12. Judgment order.
13. Order extending time to serve and tender defendant's bill of exceptions.
14. Bill of exceptions.
15. Petition for writ of error.
16. Assignments of error.
17. Order allowing writ of error and fixing amount of bond.
18. Bond on writ of error.
19. Writ of error.
20. Citation.
21. Stipulation in re certification by clerk.
22. Stipulation for order directing transmission of original exhibits.
23. Order directing transmission of original exhibits.
24. This stipulation.
25. Clerk's certificate.

IT IS FURTHER STIPULATED AND AGREED that in printing the transcript of record on writ of error in said cause all of the exhibits attached to the amended complaint, the stipulation amending the complaint and the amended stipulation amending the

complaint shall be omitted, except that as to each of such exhibits the data shown in the two right-hand columns thereof under the headings "Date paid" and "Overcharge" shall be printed.

PAUL P. FARRENS,

Of Attorneys for Defendant and Plaintiff in Error.

JAMES G. WILSON,

Of Attorneys for Plaintiff and Defendant in Error.

L-8845

CERTIFICATE OF THE CLERK OF THE
U. S. DISTRICT COURT TO TRANS-
SCRIPT OF RECORD.

United States of America,
District of Oregon—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the attorneys for the plaintiff in error, is a true transcript of the record in this cause, and that I shall certify the same without comparison.

and without comparison
NOW, THEREFORE, in accordance with said stipulation, I, G. H. Marsh, Clerk of the United States District Court, for the District of Oregon, do hereby certify that the foregoing transcript of record upon writ of error in the case in which James C. Davis, Director

General, as agent United States Railroad Administration (Southern Pacific Company) is defendant and plaintiff in error, and A. J. Parrington is plaintiff and defendant in error, is a full, true and correct transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody, ~~the same having been compared by attorneys for plaintiff in error.~~

And I further certify that the fee for certificate to the within transcript, to wit, the sum of ^{sixty five} ~~fifty cents~~, has been paid by the said plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Portland in said district this . 24. th day of . November, 1923.

Sgd. G. H. Marsh.....
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ALASKA STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

VS.

BERNARD McHUGH,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1, at Juneau.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ALASKA STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

BERNARD McHUGH,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1, at Juneau.

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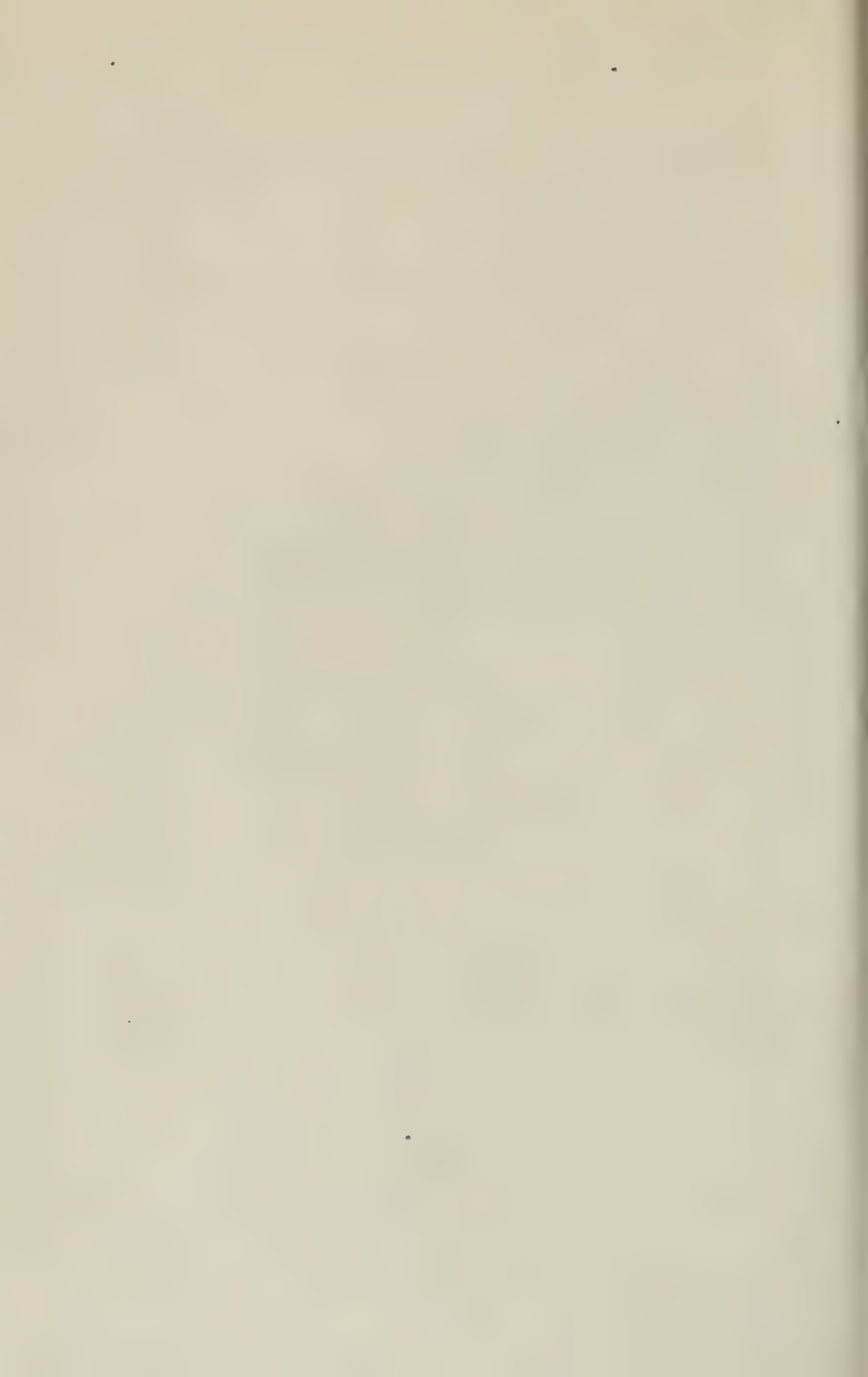
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Names and Addresses of Attorneys of Record.

R. E. ROBERTSON, Esq., Juneau, Alaska, and
A. H. ZIEGLER, Esq., Ketchikan, Alaska,
Attorneys for Plaintiff in Error.

WICKERSHAM & KEHOE, Juneau, Alaska,
Attorneys for Defendant in Error.

In the District Court for the Territory of Alaska,
Division Number One at Juneau.

No. 2212-A.

BERNARD McHUGH,

Plaintiff,

vs.

THE ALASKA STEAMSHIP COMPANY, a
Corporation,

Defendant.

Complaint.

Comes now into court the above-named plaintiff and complains of the defendant and for his complaint and cause of action against said defendant says:

I.

That at all the times mentioned in this complaint and for a long time prior thereto the defendant was, and at all time since the injury complained of herein, has been and now is a corporation organized and existing under the laws of the State of Nevada, and was at all such times, and now is, engaged in busi-

ness as a common carrier of freight in the coast-wise carrying trade in the waters of Alaska, and within the jurisdiction of this Court.

II.

That on the 8th day of March, 1922, at Ketchikan, Alaska, and within the jurisdiction of this Court, this plaintiff was employed by the defendant as a stevedore in assisting defendant's other employees unload coal from the steamship "LaTouche," which said steamship was then owned and being operated by the said defendant; that in the course of his said employment this plaintiff was ordered by the defendant to and was engaged by it in shoveling coal in the hold of said steamship into a certain bucket then in the hold of said vessel, and furnished by the defendant for that purpose, and in pulling said bucket on the floor of said hold to the point thereon where it could be filled by the plaintiff and the other employees of the defendant in the said hold; that said iron bucket was a [1*] large and heavy appliance and required the united effort of three men to so pull it to the point where it could be so filled with coal; and was so constructed with a large and heavy handle held in place by an iron trigger; and was then so worn and in an unsafe and dangerous condition from long wear and hard usage as to be, and it was, a dangerous and unsafe appliance for such work, all of which was well known to the defendant; and while this plaintiff with two other employees of the defendant at said time and place were so engaged in pulling the said large iron

*Page-number appearing at foot of page of original certified Transcript of Record.

bucket on the floor of said hold to the point needed for loading, the said defective and worn trigger thereon became and was loosed and caused the heavy iron handle of the said heavy iron bucket to loosen and fall, and the said heavy iron handle did, without any fault or negligence of the plaintiff, become loose and did fall upon this plaintiff's foot, and did strike plaintiff's foot on and across the instep thereof, and did break and crush the bones and tendons, muscles and flesh of the said foot, and crippling this plaintiff for life; that this plaintiff was thereby so injured in his said foot and in his health and nervous system, that he was thereafter in the hospital under medical treatment for many weeks, and suffered and now suffers great pain, and was ever since, and now is, unable to walk or work at his labor as a stevedore, or to do any work of any kind; and plaintiff thereby suffered great pain and a permanent injury to his said foot and general health; and was thereby compelled to suspend all his labors and thereby suffered the loss of wages from said March 8th, 1922, to the date of this complaint, and will not be able to work for months yet to come, and is crippled and injured therein and thereby permanently in said foot; that plaintiff was so injured in the sum of Ten Thousand Dollars.

[2]

III.

That the defendant well knew that said appliance by which this plaintiff was injured was unsafe and dangerous, but wilfully and negligently, omitted and refused to keep it in a state of repair or replace

it with a safe and proper appliance, and thereby caused the injury to this plaintiff as aforesaid.

IV.

That this plaintiff has no knowledge or means of finding out the condition of said iron bucket and the parts thereof, as aforesaid; that the light in said hold was dim, and this plaintiff could not see the same plainly, and was then, and now is, a common laboring man without knowledge of the mechanism of the said bucket or its said parts, and was, by reason of his inexperience and the darkness, unable to discover the defects in the said appliances; that it was then the duty of the defendant to furnish this plaintiff a safe and proper bucket and appliances for use in said work; but defendant negligently and carelessly failed and refused to so furnish such safe and proper bucket and appliance for such work, or a well-lighted place to work in, whereby because of the negligence and carelessness of the defendant this plaintiff was so injured and crippled, and was so made to suffer great bodily pains and anguish, and was so injured in a permanent way, and caused to be and remain in the hospital and in his room, and rendered unable to work for a long time, whereby he so lost his wages and paid large sums for support, all to the plaintiff's damage in the said sum of Ten Thousand Dollars.

V.

That at the time of the said injury as aforesaid, and prior thereto, this plaintiff was a strong, healthy and vigorous laboring man of the age of 38 years, capable of and was earning six and one-half dollars

per day, and had long engaged in said work and labor at first-class wages, but on account of such injury plaintiff's earning capacity [3] was wholly destroyed for the period from the date of said injury to the date of signing this complaint, and was permanently reduced by one-half or more for life, all to this plaintiff's injury in the said sum of Ten Thousand Dollars.

WHEREFORE plaintiff prays for judgment against the defendant in the sum of Ten Thousand (\$10,000.00) Dollars and for his costs and disbursements incurred herein.

WICKERSHAM & KEHOE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,
Ketchikan Precinct,—ss.

Bernard McHugh, being first duly sworn, deposes and says: I am the plaintiff named in the within and foregoing complaint; I have read the same and know well the contents thereof, and the same is true as I verily believe.

BERNARD McHUGH,
Plaintiff.

Subscribed and sworn to before me this 26 day of July, 1922.

[Notary Seal]

ALFRED E. MALTBY,
Notary Public for Alaska.

My commission expires Feby. 19, 1925.

Filed in the District Court, District of Alaska,
First Division. Aug. 2, 1922. John H. Dunn,
Clerk. By W. B. King, Deputy. [4]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 2212-A.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Amended Answer.

Comes now defendant and, for answer to the complaint herein, admits, denies and alleges:

I.

Defendant admits paragraph I of the complaint.

II.

Defendant admits that on or about the 8th day of March, 1922, at Ketchikan, Alaska, plaintiff was employed by defendant as a stevedore or longshoreman in unloading coal from the steamship "La-Touche," which vessel was then owned and being operated by defendant; and the defendant denies each and every other allegation contained in paragraph II of said complaint.

III.

Defendant denies paragraph III of said complaint.

IV.

Defendant denies paragraph IV of said complaint.

V.

Defendant denies paragraph V of said complaint.

AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the Territory of Alaska, and that it has paid [5] its annual corporation license tax last due to said Territory.

II.

That on or about March 8, 1922, defendant employed plaintiff together with and as a member of a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship "LaTouche" unto a dock or wharf at the port of Ketchikan, Alaska; that all of said stevedores and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal from vessels onto docks and wharves at said port, and were then and there fellow-servants of each other and of plaintiff engaged in the same common and general employment, i. e.; unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform said work, according to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean. i. e.; Tongass Narrows, in the Territory of Alaska, and

was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with coal tubs and other appliances, in safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on or about steamships similar to said vessel; that, while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the danger likely to result therefrom, voluntarily, carelessly and negligently, and while aboard said vessel, sought to and did move a certain tub, that was used to carry coal in and out of the hold of said vessel by pulling said tub backwards, instead of, as they then and there well knew was customary, proper and safe, moving said tub by pulling on the becketts with which for that purpose said tub was provided and by which said tub could [6] have been safely moved, and that said plaintiff and his said fellow-servants by their said pulling said tub did move said tub backwards and cause the handle with which said tub was provided to fall towards then and plaintiffs being so negligently pulling said tub backwards, was struck by said handle as it so fell, and that said careless, voluntary and negligent acts aforesaid of said plaintiff and of his said fellow-servants, so committed by them with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which

they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no case caused by the defendant.

AND AS A FURTHER SEPARATE AND SECOND AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory.

II.

That on or about March 8, 1922, the plaintiff, being then and there a man of full age and experienced in the unloading and discharging of coal and freight from vessels onto docks and wharves at the port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such work and of work on and about steamships while unloading and discharging coal, was employed by defendant together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the defendant's steamship "La-Touche" at said port; that said vessel was then and there lying in the tidal and navigable waters [7]

of the North Pacific Ocean, i. e., Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter, while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub, with which plaintiff was then and there thoroughly conversant and with which he had then and theretofore been doing said work without any complaint or objection to its condition, although he was then and there entirely familiar with such appliances and with the method of their use, and which tub was used to carry coal in and out of the hold of said vessel, by pulling said tub backwards, instead of, as he then and there well knew was customary, proper and safe, moving and assisting to move said tub by pulling on the beackets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that plaintiff by his said pulling and assisting to move said tub backwards caused, as plaintiff then and there well knew was likely to result, the handle with which said tub was pro-

vided to fall towards him, and plaintiff, being so negligently pulling said tub backwards, was struck by said handle as it was falling, and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, [8] sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by defendant.

WHEREFORE defendant prays that it may go hence without delay, and that plaintiff recover nothing by this action, and that defendant have judgment against plaintiff for its costs and disbursements herein incurred.

R. E. ROBERTSON,

A. H. ZIEGLER,

Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

C. M. Taylor, being first duly sworn on oath, deposes and says: That he is a resident of the Territory of Alaska, over the age of 21 years, and agent of the corporate defendant; that he has read the foregoing amended answer, and knows the contents thereof, and that the same is true as he

verily believes; that the reason he makes this verification is that there is no president, vice-president or other acting head of said corporate defendant now in or a resident of said territory.

C. M. TAYLOR.

Subscribed and sworn to before me this 21st day of March, 1923.

[Notarial Seal]

R. E. ROBERTSON,

Notary Public in and for Alaska.

My commission expires June 20, 1925.

Copy of the within amended answer received this 21st day of March, 1923.

J. W. KEHOE,

Of Counsel for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Mar. 22, 1923. Jno. H. Dunn, Clerk. By M. D. Morrissey, Deputy. [9]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 2212—A.

566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation,
Defendant.

**Order Directing that Reply to Original Answer
Stand as Reply to Amended Answer—Dated
March 26, 1923.**

Comes now the plaintiff and moves the Court that the reply filed herein by the plaintiff to the original answer of the defendant company in this court and cause stand as the reply to the answer, as amended, of said defendant herein,

ORDERED, that said reply be and it is hereby permitted to stand to and as the reply to the amended answer herein.

Dated this 26th day of March, 1923.

THOS. M. REED,

District Judge.

Filed in the District Court, District of Alaska, First Division. Mar. 27, 1923. John H. Dunn, Clerk. By———, Deputy.

Entered Court Journal No. D, page 375. [10]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2212—A.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Reply.

Comes now the plaintiff and for reply to the further, separate and first affirmative defense in defendant's answer herein, says:

I.

Admits the allegations in paragraph one thereof.

II.

Admits that on the 8th day of March, 1922, this plaintiff was employed by the defendant as a longshoreman in the unloading and discharging of coal from the defendant's steamship "La Touche" on to a dock or wharf at the port of Ketchikan, Alaska; admits that at that time plaintiff was of the age of 38 years; admits that said vessel was then and there lying in the tidal waters of the north Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to the said dock and wharf by lines; admits that while at said work he was injured as alleged in his complaint herein and not otherwise, and denies each and every other allegation in said paragraph contained.

And for a reply to the further, separate and second affirmative defense in said answer, this plaintiff says:

I.

Admits the allegations of paragraph one thereof.

II.

Admits that on the 8th day of March, 1922, this plaintiff was [11] employed by the defendant as a longshoreman in the unloading and dis-

charging of coal from the defendant's steamship "La Touche" on to a dock or wharf at the port of Ketchikan, Alaska; admits that plaintiff was of the age of 38 years; admits that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to the said dock and wharf by lines; admits that while at said work he was so injured as alleged in his complaint, and not otherwise, and denies each and every other allegation in said paragraph contained.

WHEREFORE plaintiff asks for judgment against the defendant as in his complaint herein prayed for.

WICKERSHAM & KEHOE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Bernard McHugh, being first duly sworn, deposes and says: I am the plaintiff named in the foregoing reply; that I have read the same, know well the contents thereof, and that the same is true.

BERNARD McHUGH,
Plaintiff.

Subscribed and sworn to before me this 22d day of November, 1922.

[Notarial Seal] JAMES WICKERSHAM,
Notary Public for Alaska.

My commission expires Sept. 15, 1925.

Service of a full, true and correct copy of the within reply is hereby acknowledged this 22d day of November, 1922.

A. H. ZIEGLER,
Of Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. Nov. 22, 1922. Jno. H. Dunn, Clerk. By M. D. Morrissey, Deputy. [12]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Verdict.

We, the jury in the above-entitled cause of Bernard McHugh vs. Alaska Steamship Company, a corporation, do find a verdict in favor of the plaintiff, Bernard McHugh, and fix his damages at the sum of Four Thousand Seven Hundred and Fifty (\$4,750.00) Dollars.

FRANK W. THOMPSON,
Foreman.

Filed in the District Court, District of Alaska, First Division. Mar. 29, 1923. John H. Dunn, Clerk. By———, Deputy.

Entered Court Journal No. D, page 379. [13]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

VS.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Judgment.

This action came on regularly for trial on the 26th day of March, 1923, and continued throughout the 26th, 27th, 28th and 29th of March, 1923. The plaintiff appeared in person and by his attorneys, Wickersham and Kehoe; the defendant appeared by its attorneys, R. E. Robertson and A. H. Zeigler. A jury of twelve persons was regularly empaneled and sworn to try the said case. Witnesses on the part of the plaintiff and defendant were sworn and examined.

After hearing the evidence, the arguments of counsel for both parties, and instructions of the Court, the jury, on the 29th day of March, 1923, retired to consider their verdict, and subsequently

and on said day returned into court, and being called, answered to their names, and say they find a verdict for the plaintiff Bernard McHugh, and which verdict is as follows:

“We, the jury in the above-entitled cause of Bernard McHugh vs. Alaska Steamship Company, a corporation, do find a verdict in favor of the plaintiff, Bernard McHugh, and fix his damages at the sum of Forty-seven Hundred Fifty (\$4750.00) Dollars.

and did thereby assess the plaintiff's damages in the sum of Four Thousand Seven Hundred Fifty (\$4,750.00) Dollars.

Thereafter and on the 31st day of March, 1923, the defendant moved herein for a new trial, which motion has been fully heard and is now overruled.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff, [14] Bernard McHugh, do have and recover of and from said defendant, Alaska Steamship Company, the sum of Four Thousand Seven Hundred Fifty (\$4,750.00) Dollars, with interest thereon at the rate of Eight (8%) per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in said action, to be hereafter taxed.

Stay of execution granted for 60 days.

Judgment rendered this 4th day of April, 1923.

THOS. M. REED,
District Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 4, 1923. John H. Dunn,
Clerk. By———, Deputy.

Entered Court Journal No. D, page 394. [15]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 566-KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Assignment of Errors.

Comes now the defendant, the Alaska Steamship Company, a corporation, by its attorneys, and respectfully assigns in connection with its petition for writ of error, the following errors committed in the proceedings and in the trial of the above-entitled action, which it intends to urge upon the hearing hereof in the Appellate Court:

I.

The Court erred in permitting plaintiff's witness Young, on direct examination, over defendant's objections, to answer the question, "Was that a safe appliance" (referring to the bucket) "to be used at that time under those circumstances in that

work?" to which said witness answered, "I would not consider it so."

II.

The Court erred in refusing to permit plaintiff's witness Young, on cross-examination, to answer the question propounded by defendant "Do you feel as positive of that" (referring to the position of the men working on the ship) "as anything else you have said in your testimony?"

III.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to testify as to the length of the time the bucket was used after plaintiff was [16] injured, and particularly to answer the question "How long was that bucket used after Barney was hurt?" To which said witness answered "I don't know just how long after."

IV.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question, "Do you know whether that bucket dumped itself when it was being taken out at any time?" To which said witness answered "I don't remember, I can't say, because I was underneath the hatch. I can't see on deck of the hatch."

V.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question, "Do you know whether there was anything, any block of wood put

in between the handle and the bucket to hold it at any time that night?" To which said witness answered, "I never noticed."

VI.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question "Was there any change made in the bucket after Barney was hurt?" To which said witness answered, "Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets."

VII.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question "Well, I will ask him the condition of the tripper then, whether it was broken or in good shape." To which said witness answered, "I never noticed any." [17]

VIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the length of time the bucket was used after the accident, and particularly to answer the question, "How long did you work with it." To which said witness answered, "It wasn't over two hours at the most."

IX.

The Court erred in permitting plaintiff's witness

Gillis, on direct examination, over defendant's objections, to testify as to the bucket tripping after he went to work, which testimony in questions and answers is as follows:

"Q. Just explain to the jury how that happened and how soon after you went to work.

Q. How long after you went to work did that happen?

A. The first time it happened was about half an hour after.

Q. What happened at that time?

A. Why it spilled all the coal out of it.

Q. Where was it when it spilled the coal?

A. In the center of the hatch.

Q. How far up?

A. Oh, it didn't get off the ground at all.

Q. Well, was the wire cable attached to it when it spilled? A. Yes, sir.

Q. Was anybody touching it? A. No, sir.

Q. What made it trip itself off, do you know?

A. Why the catch.

Q. What was the matter with the catch?

A. Wore out is all." [18]

X.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to other occasions of the bucket tripping, and particularly to answer the question, "Did it do that again any other time that evening?" To which said witness answered, "Yes, sir."

XI.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the manner that the bucket's handle fell on a subsequent occasion, and particularly to answer the question, "Why did the handle fall that time?" To which said witness answered, "Oh, it come unhooked."

XII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question, "You may state to the jury whether or not, in your judgment, it was a safe appliance, safe appliance to be used for that purpose that night." To which said witness answered, "It wasn't; no; no."

XIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the usual methods of handling coal in buckets, and particularly to answer the question, "Mr. Gillis, I wish you would tell the jury what is the usual method of longshoremen handling coal in buckets, as you were that night, follow in pulling a bucket back when it comes down to be loaded. Is there any particular way of doing it?" To which said witness answered, "Yes, sir." And in answer to the further question, "Just state if there is any usual custom or how do you do it when the bucket comes down. What do you do with

it?" To which the said witness answered, "There is generally a couple of lugs fastened on it." [19]

XIV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance for handling coal, and particularly to answer the question, "Now, from your examination of that bucket that night, and from the actions that you saw it performing, was it or was it not a safe appliance for handling coal," and, "Well, then, I will renew my question as to whether or not this bucket that night, as it was being used by Barney and these other people at that time was a safe appliance?" To which said witness answered respectively "It was not" and, "No, sir, it was not a safe appliance."

XV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to testify as to the manner another man was hurt after plaintiff's accident, and particularly to answer the question, "How was he hurt?" To which the witness answered, "The same was as Barney, only I think the bail took him further up on the leg. They got this man out of the hold and I seen him a couple of days afterwards. He was limping around, and I have seen him since." To which answer, upon defendant's motion, the Court ruled, "All that latter part may be stricken."

XVI.

The Court erred in permitting plaintiff's witness

Klemm, on direct examination, over defendant's objections, to testify as to his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question, "Mr. Klemm, from your experience as a dumper of these buckets and from your examination of that particular bucket that night, I will ask you as to whether or [20] not it was a safe appliance to be used in that class of work?" To which said witness answered, "Well, I wouldn't say so," and, "I wouldn't say it was safe because there was no way of holding that, because there was no way of holding that, because, for illustration, I think it was the first or second bucket that came out of the hold—you hoist the bucket out and give it a kind of a swing you know. The winch driver did. You know, he wasn't kind of careful enough; or kind of jerked it a little bit and the bucket was going back and forth enough to throw that little tripper up and it tripped. The bucket dumped itself before it ever got out to me."

XVII.

The Court erred in permitting plaintiff's witness Klemm, on direct examination, over defendant's objections, to answer the question, "Was there any ropes on it, or anything?" To which said witness answered, "I don't know," and, "Well, I didn't notice any ropes on it. They may have been on there, or they may not. I never used them. I would just take hold of the edge of the bucket."

XVIII.

The Court erred in permitting plaintiff in his own behalf, on direct examination, over defendant's ob-

jections, to testify as to his receiving and why he had to receive contributions or charity from other people, and particularly to answer the question, "Will you state to the jury then, Mr. McHugh, why you have had to receive contributions or charity from other people?" To which said plaintiff answered, "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital I had only \$28.00 of my own and the money I received afterwards of course I had to borrow [21] it; that I must have in order to live."

XIX.

The Court erred in permitting plaintiff's witness Mustard, on direct examination, over defendant's objections, to answer the question, "Well, can you say then whether or not the stiffness will not remain?" To which said witness answered, "There are all sorts of possibilities, but I would not say that it might not disappear, that it might not remain, but I should expect it to disappear."

XX.

The Court erred in denying defendant's motion for nonsuit at the close of plaintiff's case in chief.

XXI.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "What was the purpose of having the picture taken?"

XXII.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "All right. Doctor, you state that you had a picture taken at that time."

XXIII.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "State whether or not that was easily apparent or"

XXIV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinion, would cause that to exist at this time?" [22]

XXV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "Well, Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?"

XXVI.

The Court erred in not promptly or at all instructing the jury, at defendant's request, to disregard the statement made by plaintiff's counsel in the presence of the jury during the direct examination of plaintiff's witness Gillis, on rebuttal, that, "We offer to show by this witness and by Barney

McHugh also, who has appeared as a witness, that at that time and place they were talking with this man and he was talking generally to the people around him and that he announced publicly that he was an I. W. W., and that it was the only union and the best union, and then began a general denunciation of the Government of the United States and its officers. We offer to prove that by these two witnesses."

XXVII.

The Court erred in permitting plaintiff's witness Mustard, on direct examination on rebuttal, over defendant's objections, to answer the question, "My question is as to the condition and appearance of his foot at the time he first examined it, about the 15th of May, 1922—the outside appearance of the foot." To which said witness answered, "The foot was discolored somewhat and considerable swollen the first time I saw it."

XXVIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination on rebuttal to answer the question, "Was any instructions given to you at that time, or at any time on that boat by Mr. Pollow, the mate, or by any other officer or any other person on the boat, in regard to the manner of handling these buckets?" [23] To which said witness answered, "No, sir."

XXIX.

The Court erred in receiving in evidence, over defendant's objections, defendant's original answer

in the case, which is Plaintiff's Exhibit No. ——— and which in words and figures is as follows:

“In the District Court for the District of Alaska,
Division Number One at Juneau.

No. 2212-A.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Plaintiff's Exhibit No ———.

ANSWER.

Comes now defendant and, for answer to the complaint herein, admits, denies and alleges:

I.

Defendant admits paragraph I of the complaint.

II.

Defendant admits that on or about the 8th day of March, 1922, at Ketchikan, Alaska, plaintiff was employed by defendant as a stevedore or longshoreman in unloading coal from the steamship “La-Touche,” which vessel was then owned and being operated by defendant; and the defendant denies each and every other allegation contained in paragraph II of said complaint.

III.

Defendant denies paragraph III of said complaint.

IV.

Defendant denies paragraph IV of said complaint.

V.

Defendant denies paragraph V of said complaint.

AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws [24] of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory.

II.

That on or about March 8, 1922, defendant employed plaintiff together with and as a member of a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship "LaTouche" on to a dock or wharf at the Port of Ketchikan, Alaska; that all of said stevedores and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal from vessels on to docks and wharves at said port, and were then and there fellow-servants of each other and of plaintiff and engaged in the same common and general employment, i. e., unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform such work, according

to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.; Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out in to said waters, and was then and there fully equipped with coal tubs and other appliances, in safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that, while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the danger likely to result therefrom, voluntarily, carelessly and negligently and while aboard said vessel sought to and did move a certain tub, that was used to carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as they then and there well knew was customary, proper and safe, moving said tub forward by pulling on the beackets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that said plaintiff and his said fellow-servants by their said shoving on said tub forced the body of said tub forward and caused the handle with which said tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward

under the forward impetus so given to the body of said tub by the said negligent shoving of plaintiff and his said fellow-servants; and that said careless, voluntary and negligent acts aforesaid of said plaintiff and of his said fellow-servants, so committed by them with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by the defendant.

AND AS A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the [25] business of common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax due to said territory.

II.

That on or about March 8, 1922, the plaintiff, being then and there a man of full age and experienced in the unloading and discharging of coal and freight from vessels on to docks and wharves at the Port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such

work and of work on and about steamships while unloading and discharging coal, was employed by defendant together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the defendant's steamship "LaTouche" at said port; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.; Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub, with which plaintiff was then and there thoroughly conversant and with which he had then and theretofore been doing said work without any complaint or objection to its condition, although he was then and there entirely familiar with such appliances and with the methods of their use, and which tub was used to carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as he then and there well knew was customary, proper and safe, moving and assisting to

move said tub by pulling on the beekets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that plaintiff by his said shoving and assisting to shove said tub forward from the rear caused, as plaintiff then and there well knew was likely to result, the handle with which tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward under the forward impetus so given to the body of said tub by the said negligent shoving and assistance in shoving of plaintiff; and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had assumed said risks and dangers and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by defendant.

WHEREFORE defendant prays that it may go hence without day, and that plaintiff recover nothing by this action, and that defendant have judgment against plaintiff for its costs and disbursements herein incurred.

(Signed) A. H. ZIEGLER,

(Signed) R. E. ROBERTSON,

Attorneys for Defendant. [26]

United States of America,
Territory of Alaska,—ss.

Willis E. Nowell, being first duly sworn on oath, deposes and says: That he is a resident of the Territory of Alaska, over the age of 21 years, and agent of the corporation defendant; that he has read the foregoing answer, and knows the contents thereof, and that the same is true as he verily believes; that the reason he makes this verification is that there is no president, vice-president or other acting head of said corporate defendant now in or resident of said territory.

(Signed) WILLIS E. NOWELL.

Subscribed and sworn to before me this 27th day of October, 1922.

(Signed) R. E. ROBERTSON,
Notary Public for Alaska.

My commission expires June 20, 1925."

Copy of the within answer received this 27th day of October, 1922.

WICKERSHAM & KEHOE,
Of Counsel for Plaintiff.
XXX.

The Court erred in denying defendant's motion for a directed verdict for the defendant herein at the close of the evidence.

XXXI.

The Court erred in not promptly instructing the jury and in failing to promptly strike from the records, at defendant's request, the statement made

by plaintiff's counsel in his argument on rebuttal to the jury that; "Now, both attorneys talked about Barney's drinking and being on a spree, and they said that this damage to his foot might have been produced that way. Well, it might have been produced in a thousand different ways. But it wasn't! Doctor Mustard swore to you men positively—and there was nobody brought here to question him. They didn't even ask Doctor Story about it—Doctor Mustard swore positively that that foot was injured at the same time that the other two bones were broken by that big, iron nub which struck the bone, sunk in and broke it and bruised the foot."

XXXII.

The Court erred in failing and refusing to give defendant's requested instruction No. 1, as follows:
[27]

I instruct you that in law the plaintiff is not without fault, if it appears from the evidence that by the exercise of any care and caution which was, under the circumstances, reasonable, practicable and available, he might have avoided the injury charged.

XXXIII.

The Court erred in failing and refusing to give defendant's requested instruction No. 2, as follows:

"I instruct you that it is the duty of an employee to exercise ordinary and reasonable care in the protection of himself in the performance of his work; and if he does not do so, and his want of care contributes in any degree, however slight, to any injury to himself, then he is

guilty of contributory negligence, and cannot recover damages from his employer, even though the employer were negligent. If you find, from a preponderance of the evidence, that the plaintiff McHugh, in his work about, or in pulling on the rear rim of, the coal tub in the manner that he did, and that his want of care contributed to the happening of the injury complained of, then your verdict must be for the defendant, Alaska Steamship Company."

XXXIV.

The Court erred in failing and refusing to give defendant's requested instruction No. 3, as follows:

"I instruct you that contributory negligence is the want of ordinary care on the part of the party injured; that is to say, it is not the want of such care as an unusually prudent person would take, but the want of such care as an ordinarily prudent person would exercise under the same or similar circumstances, which, either by itself or concurring with the negligence of the defendant, if any, proximately causes the injury."

XXXV.

The Court erred in failing and refusing to give defendant's requested instruction No. 5, as follows:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff took hold of the rear rim of the coal tub in question and pulled or shoved thereon, and that when he did so he knew that the bail of said coal tub, if it should fall, could only fall toward

the rear and not toward the front of said tub, and that he could have taken hold of said tub by the rim forward of the bail thereon, or by handles attached to the lip of the tub, or beackets attached to said handles, instead of taking hold of said tub by the rear rim thereof, and that by so doing he could have moved the tub in safety, and that he took hold of the said rear rim of said tub and pulling or shoving thereon was a dangerous way of moving said tub, and that to take hold of the rim of said tub forward of the bail or by handles or beackets attached to said handles on the lip of said tub was a safe way of moving said tub, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work, in such case the jury will find for the defendant." [28]

XXXVI.

The Court erred in failing and refusing to give defendant's requested instruction No. 6, as follows:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff was directed in moving the coal tub on which he was working to move the same forward with its lip or nose in a forward position, and to so move it forward by pulling on the handles or beackets attached to said handles on the lip of said tub, if you find there were any such handles or beackets, or by taking hold of said tub forward of the bail, and you further find that such was a safe way to move said tub, and

that it had been done, the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, moved said tub either by pulling or shoving on the rear rim, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and in such case you should find for the defendant."

XXXVII.

The Court erred in failing and refusing to give defendant's requested instruction No. 7, as follows:

"I instruct you that if you believe that plaintiff was injured by reason of the bail of the coal tub falling against or upon his foot, and if you find that the condition of said tub including the bail thereof and the trigger or catch, was open and obvious to plaintiff, and considering his age and intelligence, he should and ought to have known the danger, if any, confronting him in the use of said tub and if you find from a preponderance of the evidence that the plaintiff, considering the circumstances surrounding him at the time, was not exercising such care and prudence in undertaking to do the work at which he was engaged that would or should ordinarily be exercised by a person of like age and intelligence of plaintiff under similar circumstances, then plaintiff cannot recover, even though the plaintiff at the time was working pursuant to instructions of the defendant, if you should so find."

XXXVIII.

The Court erred in failing and refusing to give defendant's requested instruction No. 8, as follows:

"I instruct you that if you find that the plaintiff was injured by reason of the bail of the coal tub in question falling upon or against him, and if you find from a preponderance of the evidence that the condition and manner in which said bail was operated and held in place and released was open and obvious to plaintiff, and if you find from a preponderance of the evidence that plaintiff was of sufficient intelligence to comprehend and know, and ought to have known, considering his age and intelligence, the danger, if any, surrounding him, then the plaintiff cannot recover anything in this case, even if the defendant company was at fault and negligent in allowing said coal tub to be used by the plaintiff or in permitting the trigger or catch on the [29] bail thereof to be out of order, if you find by the preponderance of the evidence that such is the fact and in such case you will render your verdict for the defendant."

XXXIX.

The Court erred in failing and refusing to give defendant's requested instruction No. 10, as follows:

"I instruct you further that an employee who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promises to

remedy the defect; and in the event that the master does so promise, the servant may, by relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and if you believe in this case that the tub with which the plaintiff was working, that the trigger or catch holding the bail in place thereon was defective, and that the defendant company promised to remedy the same but failed to do so within a reasonable time after such promise, and that McHugh continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such event, I instruct you that McHugh assumed the additional risk of the defect, if any, in said tub, and you will return a verdict for the defendant."

XL.

The Court erred in failing and refusing to give defendant's requested instruction No. 12, as follows:

"You are instructed that if McHugh engaged with the Alaska Steamship Company in the work of unloading or assisting to unload coal

from the steamship 'LaTouche' without at the time fully understanding or comprehending the dangers incident to such work, yet if you find that between the time of his employment and the time he was injured he learned of those dangers, if any, or in the course of his employment he ought to have known of the liability to accident by being hit by the bail of the coal tub if the same should fall, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the Alaska Steamship Company."

XLI.

The Court erred in failing and refusing to give defendant's requested instruction No. 16, as follows:

"You are instructed that the Alaska Steamship Company is [30] not responsible for the negligence of McHugh's fellow-servants, if the jury believes from the evidence that plaintiff's fellowservants were guilty of negligence, and that such negligence caused the accident by which plaintiff claims to have been injured. The term "fellow-servants" as used in these instructions means those who were engaged with the plaintiff in the same work, without any relation to each other, except as co-laborer, and without rank."

XLII.

The Court erred in failing and refusing to give defendant's requested instruction No. 17, as follows:

"You are instructed in this case that if you

find from the preponderance of the evidence that the injury which McHugh claims to have suffered was caused by the negligence of his fellow servants, that is, if his fellow servants so negligently handled, moved, pulled or shoved the coal tub with or about which McHugh was working, so as to cause the bail or handle thereof to fall and strike McHugh and to cause said injury, then your verdict should be for the defendant."

XLIII.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 1, as follows:

"I instruct you that negligence is defined as being the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

And in this case you cannot find a verdict for the plaintiff McHugh in any amount whatsoever unless you first find by a preponderance of the evidence that the injury, if any, sustained by him and the damages, if any, incurring to him by reason thereof, were the results of negligence, as hereinbefore defined, of the defendant Alaska Steamship Company or its officers, agents, or employees, or by reason of some defect or insufficiency due to its or their negligence, as hereinbefore defined, in the

coal tub or bucket with which said plaintiff McHugh claims to have been working.

In this behalf I instruct you that the mere occurrence of the injury, or of the damage complained of, if you find by a preponderance of the evidence that the plaintiff McHugh did sustain said injury and damages, is no evidence of negligence on the part of the defendant Alaska Steamship Company or of any of its officers, agents or employees, or that the existence of a defect or insufficiency if you so find, in said coal tub or bucket was due to its or their negligence, and I further instruct you that the burden is on the plaintiff McHugh to show, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence, as hereinbefore defined, which proximately caused the injury and damage. The plaintiff McHugh has the burden of proving, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence." [31]

XLIV.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 3, as follows:

"I instruct you that the mere fact that you find from a preponderance of the evidence that the bail of the coal tub on or about which McHugh claims to have been working fell upon or came in contact with his foot and injured it as claimed by him and that he suffered damages

therefrom as contended by him, is no evidence of negligence on the part of the defendant Alaska Steamship Company or any of its officers, agents or employees or that the defect, if you find by a preponderance of the evidence that there was a defect, in said tub or bucket was due to its or their negligence, but the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company was guilty of negligence which proximately caused said, if any, injury, and said, if any, damages, that is to say, the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company or its officers, agents or employees failed to observe, for the protection of said McHugh while he was working on said vessel 'LaTouche' on March 9, 1922, that degree of care, precaution and vigilance which the circumstances in connection with said work justly demanded, and that by reason thereof said McHugh suffered said injury and damages."

XLV.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 4, as follows:

"I instruct you that in this case even though you should find the defendant Alaska Steamship Company guilty of negligence from a preponderance of the evidence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been per-

manently injured for the reason that there is no evidence in this case that said McHugh has been permanently injured."

XLVI.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 5, as follows:

"I instruct you that in this case even though you should find from a preponderance of the evidence the defendant Alaska Steamship Company guilty of negligence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been permanently incapacitated for the reason that there is no evidence in this case that said McHugh has been permanently incapacitated in his earning power." [32]

XLVII.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 6, as follows:

"I instruct you that you cannot find the defendant Alaska Steamship Company guilty of negligence in this case unless you find from a preponderance of the evidence that it had knowledge of the defect, if any, in the coal tub or bucket being used by McHugh or that it should have, in the exercise of ordinary care, acquired such knowledge. I instruct you that it is a rule of law that the master is not usually liable for latent defects, nor is he liable for defects arising so short a time prior to the accident, if any,

as not to have been discovered by him in the course of his reasonable inspections. In this case the Alaska Steamship Company is known as the 'master,' and the plaintiff McHugh is known as the 'servant.' "

XLVIII.

The Court erred in giving its certain instruction numbered 7, which is as follows:

"You are instructed that the defendant, the Alaska Steamship Company, admits in its answer in this case that the plaintiff herein was one of its employees engaged by it in unloading and discharging coal out of its steamship, the 'LaTouche,' on to the dock or wharf at Ketchikan, Alaska, on March 8, 1922, and also on that day and at all times since that day the said Alaska Steamship Company, defendant herein, was and now is a common carrier engaged in trade and commerce in the Territory of Alaska."

XLIX.

The Court erred in giving its certain instruction numbered 8, which is as follows:

"You are instructed that every common-carrier engaged in trade or commerce in the Territory of Alaska, shall be and is liable to any of its employees for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, appliances and machinery; and you are also instructed that in all actions brought against any common carrier to recover damages for personal injuries to an employee, the fact that the

employee may have been guilty of contributory negligence shall not bar a recovery by the employee where his contributory negligence was slight and that of the employer was gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

L.

The Court erred in giving its certain instruction numbered 9, which is as follows: [33]

"You are further instructed that in this case the defendant the Alaska Steamship Company, is liable to the plaintiff for all damages which may have resulted to him from the negligence of the defendant or by reason of any defect or insufficiency due to its negligence in its appliance, machinery, ways or works, causing the injury to his person, if any, so alleged to have been received by him on March 8, 1922, while so employed by the defendant in unloading and discharging coal from defendant's steamship, the 'LaTouche,' onto the wharf or dock at Ketchikan, Alaska."

LI.

The Court erred in giving its certain instruction numbered 10, which is as follows:

"If you should find from the evidence, however, that the plaintiff was guilty of any contributory negligence in causing the injury complained of, you are hereby instructed that such contributory negligence shall not bar a recovery

by him in this case, where his contributory negligence was slight and that of the defendant was gross in comparison. If you should find that the plaintiff was guilty of contributory negligence at the time of the alleged injury, it would then be your duty to determine from the evidence in the case whether his contributory negligence was slight in comparison with that of the defendant, and to diminish the damages, if any, to be allowed to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and of the defendant, and to return a verdict accordingly."

LII.

The Court erred in giving its certain instruction numbered 11, which is as follows:

"You are instructed that no person shall recover damages from a common-carrier under the laws in force in Alaska for personal injury to himself, where the injury was done by his own consent, or was caused by his own negligence, without any negligence on the part of the defendant; but where the plaintiff and defendant are both at fault, the plaintiff may still recover, provided he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee."

LIII.

The Court erred in giving its certain instruction numbered 14, which is as follows:

“The jury are instructed that contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you shall find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit is brought provides that such contributory negligence is not to defeat a recovery altogether, but that the damages [34] shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of himself and the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.”

XIV.

The Court erred in giving its certain instruction numbered 15, which is as follows:

“The statute under which this suit is brought makes the defendant liable to the plaintiff for all injuries suffered by the plaintiff because of its negligence, or that of any of its officers, agents or other employees. Therefore, as a matter of law, the negligence of any officer, agent or employee of the defendant, other than

the negligence of the plaintiff himself, is the negligence of the defendant, for which it would be liable."

LV.

The Court erred in giving its certain instruction numbered 16, which is as follows:

"The plaintiff in this case alleges that the injury he suffered, if any, was caused by the negligence of the defendant in failing to furnish a safe and well-lighted place for him to work in, and safe appliances and equipment with which to work, whereby, he was injured.

On this branch of the case, the Court instructs you that an employer does not guarantee the absolute safety of the place where the employee works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employee to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant or employee does not undertake to incur the risk arising from the negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendant and its officers, agents and employees in charge of the work on the steamship 'LaTouche' at the time of the injury to plaintiff, resulting from the employment of the plaintiff as a

laborer in such work, to exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find by a fair preponderance of the evidence that the plaintiff was so injured on the defendant's steamship 'LaTouche' on March 8, 1922, while so unloading and discharging coal therefrom, and that the place where he was required to work was dark and badly lighted, and that the condition of the light prevented the plaintiff from discovering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff." [35]

LVI.

The Court erred in giving its certain instruction numbered 17, which is as follows:

"The Court further instructs the jury that it was the duty of the defendant steamship company, its officers, agents and employees having charge of the work in which plaintiff was engaged when he was injured, to furnish to the plaintiff who was in his employ, such tools, appliances, tubs and other instrumentalities as were reasonably safe for the purpose for which they were used, and the Court instructs the jury that if they believe from a fair preponderance of the evidence in this case, that the defendant steamship company or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which

it knew to be defective, or which its officers, agents, or employees whose duty it was to superintend the plaintiff's work, knew to be defective, or which, by the exercise of reasonable diligence the defendant or its officers, agents or employees superintending said work might have known to be defective and liable to drop the handle of the said iron bucket when so being used in said work, and that in consequence of said defect the plaintiff, while exercising ordinary care, was injured while in the performance of his duties, then the jury should find a verdict for the plaintiff."

LVII.

The Court erred in giving its certain instruction numbered 19, which is as follows:

"One of the defenses in this case is that the plaintiff being of full age and experienced in the work of unloading and discharging coal from a steamship unto a wharf or dock at Ketchikan, Alaska, assumed the risks of the employment and cannot recover for that reason.

On that branch of the case the jury are instructed that the plaintiff assumed only the risks of the injury which were ordinarily incident to the employment in which he was engaged; and you are further instructed in this connection, that by the use of the expression "a risk ordinarily incident to the employment" is meant a risk of injury that does not arise or grow out of any act of negligence on the part of the defendant or its servants, and that whenever a risk is created by an act of negligence on

the part of a steamship company operating as a common carrier, or its employees, this is not a risk ordinarily incident to the employment; and if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than his own negligence, if any, this would not be a risk which he assumed as incident to his employment.

LVIII.

The Court erred in giving its certain instruction numbered 20½, which is as follows:

“There is this difference between the defense of [36] contributory negligence and that of assumption of risk. Contributory negligence is the omission of the employee to use those precautions for his own safety which ordinary prudence requires; while assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master’s employ without objection, he takes upon himself the risk of injury from such defects.

The jury, in the case of defense of contributory negligence, should compare the negligence of the parties, if any shown, and such defense is not a bar to plaintiff’s recovery, where his contributory negligence was slight and that of the

employer was gross in comparison, but the damages should be diminished by the jury in proportion to the amount of the employee's negligence.

If the jury, on the other hand, find that the plaintiff assumed the risk of his employment under the instruction I have given you, then such finding would be a bar to plaintiff's recovery and your verdict should be for the defendant."

LVIX.

The Court erred in giving its certain instruction numbered 21, which is as follows:

"The jury is instructed that if you shall find a verdict for the plaintiff in this case, it will be your duty to assess the damages which he has sustained, not to exceed the sum of Ten Thousand Dollars demanded in his complaint. The damages, if any, in this case, cannot be exemplary; that is, given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint, also the condition of his health and physical ability to labor, before the accident complained of, as compared with the present condition thereof and how far the injury is probably permanent in its character and results, as well as the mental and physical suffering he has suffered, if any, by reason of the injury;

and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate results of the accident, not to exceed the amount demanded in the complaint."

LX.

The Court erred in receiving and filing herein the verdict of the jury in favor of the plaintiff and against the defendant.

LXI.

The Court erred in entering judgment herein in favor of the plaintiff and against the defendant, which said judgment was entered herein on April 4, 1923, in favor of the plaintiff and against the defendant, for the sum of \$4,750.00.

R. E. ROBERTSON,
A. H. ZIEGLER,
Attorneys for Defendant.

Filed in the District Court Territory of Alaska,
First Division. Jun. 1, 1923. John H. Dunn,
Clerk. By ———, Deputy. [37]

In the District Court for the District of Alaska,
Division Number One at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpo-
ration,

Defendant.

Petition for Writ of Error.

Comes now the Alaska Steamship Company, a corporation, the above-named defendant, and complains that in the records and proceedings had in the District Court for Alaska, Division Number One, in Case No. 566—KA, Bernard McHugh, Plaintiff, vs. Alaska Steamship Company, a Corporation, Defendant, and also in the rendition of the judgment in said cause in said District Court against said Alaska Steamship Company, a Corporation, in the sum of \$4,750.00 on April 4, 1923, together with interest thereon and costs, manifest error hath happened to the great damage of the said Alaska Steamship Company, a corporation, as will more fully appear from the assignment of errors filed herewith, and respectfully prays that a writ of error may be issued herein, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 26th day of May, 1923.

R. E. ROBERTSON & A. H. ZIEGLER,
Attorneys for the Alaska Steamship Company.

Filed in the District Court, Territory of Alaska,
First Division. Jun. 1, 1923. John H. Dunn,
Clerk. By ———, Deputy. [38]

In the District Court for the District of Alaska,
Division Number One at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpo-
ration,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, the Alaska Steamship Company, a Corpora-
tion, as Principal, and the United States Fidelity &
Guaranty Company, a Corporation, as Surety,
hereby acknowledge ourselves to be indebted and
firmly bound to pay to Bernard McHugh the sum
of Six Thousand Dollars (\$6,000.00) good and law-
ful money of the United States, for the payment of
which sum, well and truly to be made, we hereby
bind ourselves, our and *and* each of our successors
and assigns, jointly and severally, firmly by these
presents.

Sealed with our seals and dated the 1st day of June, 1923.

The condition of this obligation is such, however, that whereas the above bounden Alaska Steamship Company, a corporation, has sued out a writ of error in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered, made and entered in said cause on the 4th day of April, 1923, wherein and whereby it is ordered, adjudged and decreed that Bernard McHugh, the above-named plaintiff, have and recover from the said Alaska Steamship Company, the above-named defendant, the sum of \$4,750.00, with interest thereon at the rate of eight per cent per annum from said date, together with his costs and disbursements,

NOW THEREFORE, if the said Alaska Steamship Company, a corporation, shall prosecute its said writ of error to effect, and [39] shall answer for and pay all such damages and costs as may be awarded against it, if it fail to make its plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

ALASKA STEAMSHIP COMPANY, a
Corporation,

By R. E. ROBERTSON,
Its Attorney,
Principal.

[Seal Surety Co.]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Corporation.

By R. E. ROBERTSON,
Its Attorney in Fact and General Agent,
Surety.

Acknowledged before me this 1st day of June, 1923.

[Notary Seal]

A. H. ZIEGLER,

Notary Public for Alaska.

My commission expires July 15, 1925.

Approved as to form and sufficiency of surety, this the 1st day of June, 1923, and it is hereby ordered that said bond shall operate as a supersedeas from the filing hereof.

THOS. M. REED,

District Judge.

Filed in the District Court, Territory of Alaska, First Division. June 1, 1923. John H. Dunn, Clerk. By ———, Deputy. [40]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court for the District of Alaska, Division Number One, GREETING:

Because in the record and proceedings and by the verdict of the jury, as also in the rendition of a judgment of a plea in said District Court, which is before you, wherein Bernard McHugh is plaintiff, and Alaska Steamship Company, a corporation, is defendant, a manifest error hath happened to the great prejudice and damage of the said Alaska Steamship Company, a corporation, as by its petition doth appear.

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, DO COMMAND YOU, if judgment be therein given, that then under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things pertaining thereto, to the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, so that you have the same before said Court on or before thirty (30) days from the date of this writ, so that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, what of right, and

according to the laws [41] and customs of the United States ought to be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, and the Seal of the District Court of the District of Alaska, Division Number One, affixed at Ketchikan, Alaska, this 1st day of June, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

The foregoing writ allowed this the 1st day of June, 1923.

THOS. M. REED,
District Judge.

Copy of the foregoing writ of Error received and due service admitted, this 1st day of June, 1923.

WICKERSHAM & KEHOE,
Of Counsel for Plaintiff (Defendant in Error).

Filed in the District Court, Territory of Alaska.
First Division. Jun. 1, 1923. John H. Dunn,
Clerk. By———, Deputy. [42]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to Bernard McHugh, and to Messrs. Wickersham and Kehoe, his Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this Citation, pursuant to a Writ of Error filed and lodged in the Clerk's office of the District Court for the District of Alaska, Division Number One, in that certain cause wherein you, the said Bernard McHugh, are plaintiff (and defendant in error), and the Alaska Steamship Company, a corporation, is defendant (plaintiff in error), then and there to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 1st day of June, 1923.

[Seal]

THOS. M. REED,

District Judge.

Attest:

JOHN H. DUNN,

Clerk of the District Court.

Due service and receipt of copy of the foregoing citation admitted this 1st day of June, 1923.

WICKERSHAM & KEHOE,
Of Counsel for Plaintiff (and Defendant in Error).

Filed in the District Court, Territory of Alaska, First Division. June 1, 1923. John H. Dunn, Clerk. By———, Deputy. [43]

In the District Court for the District of Alaska, Division Number One, at Ketchikan, Alaska.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on duly and regularly to be tried at Ketchikan, Alaska, on Monday, the 26th day of March, 1923, before the Honorable Thomas F. Reed, Judge of said Court, and a jury having been empaneled, thereupon the following proceedings were had and done, to wit: [44]

Testimony of John G. Young, for Plaintiff.

JOHN G. YOUNG, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. Young, state your name, will you, to the jury?

A. John G. Young.

Q. How old are you?

A. I'll be forty in September.

Q. How long have you resided in Alaska?

A. Why, since— My last residence in Alaska, for this period, would run back to 1915.

Q. Are you a married man? A. Yes, sir.

Q. Where does your family reside?

A. Here in Ketchikan.

Q. What is your business, Mr. Young?

A. I'm following electrical work.

Q. What do you mean by that?

A. Why, I am at present working as a lineman with the light and power company.

Q. Here in Ketchikan? A. In Ketchikan.

Q. Have you ever done any work on the wharf assisting in unloading coal?

A. Yes, sir.

Q. When?

A. Not since this particular time. It was a year ago.

(Testimony of John G. Young.)

Q. Do you know McHugh, the plaintiff in this case? [45]

A. Yes, I have got acquainted with him lately.

Q. Did you know him at that time that you mentioned, of your working on the wharf?

A. No, I didn't know him then.

Q. Do you remember working down there, unloading coal, about the eighth or ninth of March, 1922?

A. Yes.

Q. What steamship were you unloading from?

A. Well, my recollection is that it was the "La-Touche."

Q. And when was it you assisted in unloading this coal?

A. Well, during the—I started in about noon-time and worked till midnight.

Q. On the eighth of March?

A. Well, I guess it was that day; yes.

Q. You started in at noon and worked till midnight?

A. About one o'clock; and we had an intermission for lunch, or supper, at six o'clock.

Q. Yes.

A. Started in again at seven and worked till midnight.

Q. What part of the work did you do?

A. Why, I was dumping the buckets on top of the hopper as they came from the boat.

Q. The buckets were loaded with what?

A. With coal.

(Testimony of John G. Young.)

Q. From where did they get this coal?

A. Why, out of the hatch.

Q. Out of the hatch of the "Latouche"?

A. Yes, out of the hatch of the "Latouche."

Q. How was it brought up to you, Mr. Young?

[46]

A. Passed up by the winch in these tubs that they used.

Q. How many tubs were being used that night—that afternoon and night?

A. Why, we started in with three tubs to break down the hatch. The coal was piled up level with the main deck of the boat. I don't know whether it is the main deck or not, but it is the top deck of the boat.

Q. Yes.

A. And the coal was loaded up level with that, and they took the covers off and unloaded down to the next solid planking or deck, or whatever they had, underneath.

Q. How many buckets did you say they were using?

A. We started with three buckets.

Q. Did you use three buckets all afternoon and all evening until twelve o'clock?

A. No; there was a period when we only used two buckets.

Q. Yes.

A. When they first started to break it down the space was rather small, for one thing, and they dumped in and only used two buckets.

(Testimony of John G. Young.)

Q. How long did that last?

A. I really couldn't tell.

Q. But they afterwards used three?

A. Later on in the shift we went back and went to using three buckets again.

Q. How many men, if you know, were working in the hold on those buckets?

A. There were three men to each bucket.

Q. Three men to each bucket. There were nine men, then, in the [47] hold?

A. Yes.

Q. Do you know whether Mr. McHugh was one of those men or not?

A. Well, really, I don't recall the man at all, because he was— The crew, you see, worked until six o'clock; so it was night-time when he came on shift; but I could see figures down there in the hold, but after a man has been working in coal for a little while, you couldn't distinguish whether he was a white man or a nigger.

Q. Well, you had charge of the dumping of these buckets up at the hopper?

A. Yes.

Q. And what became of the coal when you dumped it in the hopper?

A. Why, there is a little dump-car that dumps out of the sides and they would run that in on a little track and as you trip the bucket, the coal slides down this chute and fills the car, and then the two men, or probably three men—I am not sure,

(Testimony of John G. Young.)

—but they took them out anyway, pulled the car back and dumped it into the bunkers.

Q. Now, did you notice anything the matter with any of those buckets that afternoon and evening?

A. Yes; there was with one of the buckets.

Q. Well, tell the jury, what, if any, difference there was between that and the other buckets?

A. Why, this bucket— As I said just now, we started in with three buckets and we had pretty good luck with the two first ones, I think, and the next bucket dumped; so—they were working right in the square of the hatch, you see, and being [48] that this bucket dumped the way it did, why, we threw it to one side, after, I believe, it had dumped twice. We threw that bucket to one side and then they worked along with the two buckets that didn't dump after we tried them out.

Q. Who instructed that it be laid aside?

A. Well, I don't know. I guess I shouted as much about it as anybody.

Q. Do you know whether there was a mate there, belonging to the boat that had charge of the men?

A. I expect there was.

Mr. ROBERTSON.—That is quite leading.

Mr. WICKERSHAM.—Yes.

Mr. ROBERTSON.—Leading all along that way with an intelligent witness.

The WITNESS.—Pardon?

Mr. ROBERTSON.—I'm objecting to the testimony.

(Testimony of John G. Young.)

The COURT.—It may be a little leading, but I think it is simply preliminary.

Q. Do you know who the mate was?

A. No; just that there was a man there with gold braid on his cap. That is, so far as I was concerned there, I figured he was the mate. If he walked up and down and assumed the position of ordering you around, you would figure he had authority. I wouldn't do it.

Q. Where was he employed?

A. I expect he would be working on that boat.

Q. Do you know that he was?

A. I presume so.

Q. Well, did he give orders?

A. I expect so; yes; he did to me. [49]

Q. Who caused the bucket to be laid aside? You say you made a complaint about it?

A. Yes; I did.

Q. Well, who laid the bucket aside?

A. I really couldn't tell you. I think they just ran it to one side and left it there.

Q. Was the mate around there, do you know?

A. At that instant, I couldn't tell you.

Q. Well, how many times did the bucket dump itself that afternoon before you laid it aside?

A. Twice anyway.

Q. Well, now, was it put on later to work?

A. It was later on in the night.

Q. Later on in the night. What time? Do you know?

A. No; I think after—

(Testimony of John G. Young.)

Q. (Interrupting.) Wasn't it on at six o'clock when you began to work again, or seven?

A. It must have been put on before six o'clock.

Q. Yes.

A. Some time late in the afternoon the bucket was put back to work because they had opened up enough room for the men to be able to work in reasonably— You know, you could kind of hide a little bit from the treacherous bucket going out.

Q. Now, what happened to the bucket? What was the matter with it?

A. Why the catch on the side was faulty. You couldn't hold the thing. A little bit of a jar would unlatch it and the thing would dump. The way the buckets are built—

Q. (Interrupting.) Just tell this jury, now, as nearly as you [50] can what would cause the bucket to unlatch.

A. Why, a little jar would cause this hickey to come through in the bail. It would just kick that little catch loose. It only needs to raise the catch about an inch. That is the margin of safety. If the catch raises an inch, why the bucket will dump.

Q. You say that the bucket dumped how many times that afternoon?

A. Well, I am quite sure that the first bucket that came over the ship was dumped into the bay.

Q. How many more times that afternoon?

A. After this interval, Judge, I wouldn't attempt to state how many times the bucket dumped.

(Testimony of John G. Young.)

Q. Did you notice the latch or the trigger on that bucket to see whether it was in shape?

A. Why, yes; it was perfectly apparent to me why the bucket dumped. I could see it, because the bucket dumped right alongside of me the first time it did dump.

Q. Tell the jury why that bucket dumped.

A. Well, to my recollection, the tide was quite low and the boom—the way the length of the boom was, they had to haul their lead just as high as they could to get the bucket up enough to clear the edge of the hopper, and this first bucket being that it was the first trip with a load—we tested it once with an empty bucket to see if I had centered the boom right and that was all right, apparently. You could handle an empty bucket without any trouble, but when you had three quarters of a ton of coal or so in the bucket, it was quite an effort, then, to hold it with a line that was [51] slack enough so as to clear the edge of the hopper where I was standing, and he didn't judge the distance right and it struck the hopper and the bucket unlatched and she dumped right there, partly into the bay and partly on the dock.

Q. Now, let me find out where you stood. Tell the jury just where you were working.

A. Well, I got a little platform at the top side of the hopper that's about, oh, probably that wide (showing) to stand on, with a little rail probably as high as the desk (indicating) from the floor.

Q. Behind you?

(Testimony of John G. Young.)

A. No; it would be alongside of me in my work. Of course, at times in my work, it would be behind me.

Q. Now, how high were you up from the dock when you stood there by that hopper?

A. Probably 22, 23—might have been 25 feet.

Q. Above the deck of the vessel?

A. At the beginning of the unloading period, we would be a good deal higher than that, because of the low tide and the deck of the vessel, of course, would be way down below the dock.

Q. Was that an old bucket or a new bucket?

A. Well, it had seen service.

Q. What was broken about it?

A. Why, on this latch device on the bucket, there is a bit of a handle that you can tie on and make fast to the side of the bucket and this hanging handle is where it was broken off in this case.

Q. Was that why it dumped?

A. Well, the fact that the handle wasn't there you couldn't [52] make it fast and you couldn't prevent it from dumping with the latch unhooked.

Q. Well, now, just tell the jury what you mean by dumping?

A. Well, it causes the bucket to turn almost upside down.

Q. And spill the coal out.

A. And the coal would spill out.

Q. What caused it to do that?

A. Well, the latch unfastening would certainly cause it to dump.

(Testimony of John G. Young.)

Q. Was it unfastened by somebody or did it accidentally unfasten itself? How about that?

A. This time that I speak of, the first load, I am sure it dumped as the result of striking the hopper that I was standing on.

Q. Yes.

A. It hit it with a good, sound smack and this little latch just flew off and the coal dumped.

Q. Now, there were two other buckets being used?

A. Yes.

Q. Did either of them at any time dump themselves? A. I don't think so.

Q. This was the only bucket that dumped itself?

A. I am quite sure.

Q. And it dumped because it was broken?

Mr. ZIEGLER.—Just a moment. That is leading, if the Court please.

The COURT.—Yes.

Mr. WICKERSHAM.—Yes.

The COURT.—Objection sustained. State the reason. [53]

Q. State the reason why it dumped.

A. I don't see any reason. The bucket dumped because of the latch. There wasn't anything to keep it from not dumping.

Q. I will ask you this: If a bucket that is used in the way those three buckets were used, upon which the latch is broken as it was broken upon that bucket and which therefore had a tendency to dump itself, is a safe appliance to be used in that kind of work?

Mr. ROBERTSON.—Now, wait. I think the

(Testimony of John G. Young.)

witness first ought to be qualified as to his experience on a question of that kind.

The COURT.—Yes; objection sustained.

Q. How much work of that kind have you done?

A. Some years ago I worked for several months during three winters.

Q. You were hoisting coal and hoisting other materials out of boats?

A. I never acted as hoistman in this country. I have dumped quite a few hundred tons of coal, though, I think.

Q. What kind of buckets did you work with?

A. Buckets of this type—round buckets.

Q. How much experience have you had in that kind of work?

A. Why it would probably total up a year and a half of work of that kind.

Mr. WICKERSHAM.—Well, then, Ill renew my question, as to whether, under those circumstances, this was a safe appliance to be used in this kind of work.

Mr. ROBERTSON.—That calls for a conclusion of the witness also.

Mr. ZIEGLER.—Question for the jury to say from the facts [54] produced.

The COURT.—Well, he can give his opinion. I think he has qualified as an expert. Simply a matter of opinion. He may answer.

Q. Was that a safe appliance to be used at that time under those circumstances in that work?

A. I would not consider it so.

(Testimony of John G. Young.)

Q. No. You went to work, you say, at twelve o'clock noon or night? A. No; at noontime.

Q. You went to work at noon. How late did you work? A. Until midnight that night.

Q. What kind of weather was it, especially that night?

A. Well, during the day and night it was very mean weather, raining and turning to snow—blustery, miserable day altogether.

Q. What kind of light did you have up where you were at work?

A. Well, when we needed a lamp or light, I could call for an electric light and I got— They didn't have any extension cords that they could give me electric light, so I had a lantern—an ordinary coal oil lantern.

Q. Just a single coal oil lantern. Where was it hung?

A. It was hung on a piece of wood that was—oh, I don't know—a two by four probably. It was nailed on to the end of the building up there.

Q. What lights were below you on the boat, that you could see?

A. Just the lights in the hatch for the men at work.

Q. How dark was it between you and the hatch?

A. Well, where I was standing it was dark; that is, after it became dark. [55]

Q. Yes.

A. Where I was standing and looking over into the side of the ship, the glare of the light in the

(Testimony of John G. Young.)

hatch was such that I couldn't distinguish the deck or objects on it very plainly.

Q. Could you see the winchman?

A. At odd times I could see him; yes. If there was a break of steam went by that would reflect some of the light from the hatch. The steam from the winches would go past him and I would get a little reflection that way, and at times I would just get a glimpse of him.

Q. Well, in general, was it light or dark or unusual? A. Quite dark, I would say.

Q. During that evening, after dinnertime, what effort did you make to secure better arrangements on these buckets, for handling, if any?

A. I didn't make any after dinner. I made a kick for them when I first started to work.

Q. Just tell the jury what you did?

A. Why, these buckets with a handle on them, this trip apparatus—I don't know whether the jurymen are familiar with it or not; it's so familiar to me that I can hardly figure that a man doesn't know all about it.

Q. Go right ahead and tell what you know about it.

A. There is a handle hangs down from this latch proper and there is a hole punched in it so you can fasten a short lanyard; so you can lash this thing fast to get away from this possibility of a bucket dumping and when I started to work there, they sent these buckets up and they had no lanyards [56] on them and, as I say, this bucket dumped

(Testimony of John G. Young.)

and the way it dumped I took a look at it and saw it wasn't lashed. There was no lanyards there; so I called for lanyards and somebody on the boat—who I don't know—didn't know what this lanyard was for or why a lanyard was wanted. Maybe I didn't use the right word, but I thought the word was allright there and I used it, but eventually I got two or three little pieces of rope and they sent them up to me, and I threw them back down on board the boat and told them to make them fast where they belonged, which they did. They tied these on to two of these buckets. The other bucket they couldn't tie the rope on to because there wasn't anything to tie on to. So we had two buckets with lanyards on them and the practice was to tie this lanyard on a little nub of iron that sticks out of the side of the bucket and then when it would come back to me, I would untie it and dump the bucket and tie it up again; and that was the way I was working.

Q. What was the purpose of having that lanyard on there and having it tied?

A. As I said before, to keep the bucket from dumping.

Q. If that lanyard was on there and tied, would the bucket dump itself?

A. It would have to jump through the hoop to do it. If the thing was tied on there, it couldn't get away.

Q. On this third bucket, there was no lanyard?

A. There was no way of fastening a lanyard to it

(Testimony of John G. Young.)

because this (indicating) “hickey” business that hung down there was missing.

Q. Did you notice whether it was broken off or not? A. It looked to me like it got wrenched off. [57]

Q. Did you notice any effort made to fasten the trigger on this bad bucket at any time with a wooden block or rope or anything?

A. No; I didn't see any wooden block used on that bucket at any time or on any of the buckets. We used a rope and made two of them fast and the other one we trusted to glory, I guess.

Q. How large is one of these buckets? Just stand up and tell the jury about how high it is and how wide and the length of it.

A. Well, I would say that the buckets are as follows: deep as that desk (pointing) and probably that deep (indicating) to where my feet are—

Q. Yes.

A. And from the back of the bucket to the dumping lid would be a good span like that (showing)—

Q. Yes. A. Or less.

Q. And the width of it?

A. Well, then, the width of it would be in the neighborhood of that desk. I never measured one of them. I just have it in my mind's eye. Then there are different sizes of them, but this particular bucket that we're talking about, they were about that size—I should say that they were about that wide (showing).

Q. What were they constructed of, Mr. Young?

(Testimony of John G. Young.)

A. Why, they're made out of pretty heavy sheet iron and they were reinforced on the corners and around the dumping lip, and so forth, to make them as stiff and worthy as they can be. [58]

Q. Do they sit flat on the deck?

A. No; they sit on three rollers.

Q. Where are those rollers?

A. Possibly four rollers. I think there were three rollers on them. Why, there's two rollers on the front of the dump lip at the bottom and one at the back on the bottom.

Q. How are those rollers constructed—so the bucket could be whirled around on the rollers?

A. No; they were riveted fast in their housings.

Q. Which way did the rollers permit the bucket to be slid or rolled?

A. Well, they— Let's say the lip of the bucket is to you. That lip of the bucket could be rolled, or the whole bucket could be rolled in your direction or towards me.

Q. It could roll either backward or forward on those rollers? A. Yes; calling it that way.

Q. How much do you think one of those buckets would weigh?

Mr. ROBERTSON.—Is that just a guess or an estimate?

Mr. WICKERSHAM.—An estimate.

A. I should estimate that they would weigh in the neighborhood of six hundred pounds.

Q. Loaded or unloaded?

(Testimony of John G. Young.)

A. That is the empty bucket. I don't know; I never tried to lift one. I don't think I could.

Q. What sort of handle does it have on it? What sort of a bail?

A. Well, it is a big, heavy U-shaped piece of iron, with some kind of forging in the center at the top when it is up to hang the hook to to keep it from sliding, you know—to hold it in the center.
[59]

Q. How large is that bail?

A. It is probably—it is in the neighborhood of three inches wide on the top at the center and better than an inch and a quarter thick.

Q. And where is it fastened to the bucket?

A. Down near the bottom on each side.

Q. On each side. What holds the bail in place?

A. The bail is held in place by a piece of iron about a half an inch thick. It answers as a dog, so that when the bail is held perpendicularly, this dog is engaged by the latch falling over and it is held that way.

Q. What position is that bail usually in when it is ready for work?

A. When you are ready to lift the bucket?

Q. Yes. A. It is erect; perpendicular.

Q. Stands up straight? A. Yes.

Q. How do you trip the bail? How do you let it down?

A. Well, if you want to let the bail down, you operate this catch on the side and let the bail down.

(Testimony of John G. Young.)

Q. The bail, as I understand you, is hung lower than the center of the bucket. A. Oh, surely.

Q. How high does it come above the bucket?

A. The bail rises over the top of the bucket about two feet.

Q. About two feet? A. About that; yes.

Q. What is in the center of the top of that bail?
[60]

A. There is some kind of iron—I don't know whether it is forged or not, but there is a piece of iron shrunk on there, I think to hold the hook.

Q. And is arranged so that the hook goes in it?

A. Yes, sir.

Q. And then how do you raise that bucket out of the hold or let it down?

A. You have to use a winch.

Q. Well, you have a rope to go down, too?

A. Wire, with a chain on it.

Q. And what do you catch the hook with or the bail with? A. With the hook.

Q. With the hook?

A. On the end of this chain.

Q. On this chain that comes down? A. Yes.

Q. What is that chain connected to, or wire rope?

A. Well, the chain is connected to a wire cable and the wire cable to the winch.

Q. How is it raised with a winch?

A. By steam power.

Q. By steam power? A. Yes.

(Testimony of John G. Young.)

Q. How much will that handle weigh, in your judgment?

A. Well, that handle is solid metal. It is rather a hard thing. I never weighed one. I don't know what the atomic weight is or anything like that. I should say, by judging the weight of them, by just letting one of them down, it would weigh in the neighborhood of 200 pounds, if you try to lift the whole thing. [61]

Q. Now, assuming this bucket to be sitting on this floor, with its nose in this direction away from the jury, and its back this way and the handle to be up, could it be tripped, sitting there on the floor?

A. Surely.

Q. How would you do that?

A. Just release that catch.

Q. Just release the catch where—on the side of the bucket? A. On the side of the bucket.

Q. And then, the back of the bucket being to the jury, which way would the handle fall?

A. The bail can only go in that direction (showing).

Q. It can only go backwards? A. Yes.

Q. It doesn't go forward?

A. Not unless your bucket is completely busted. This dog that locks the bucket keeps the bail from going forward.

Q. How long is the half side of that bail—from the point where it is fastened to the bucket on the lower side up to the center of the bail, how far is

(Testimony of John G. Young.)

it, on that particular bucket, as near as you can judge? A. Oh, I should say over four feet.

Q. Over four feet.

A. Four feet and some inches. I don't think it would be five feet.

Q. And assuming that a bucket is sitting here on the floor and the trigger is jarred sufficiently to let it loose and there is no rope on it to hold it up, what would happen?

A. It would just naturally fall over. [62]

Q. And how much a blow would it give if it fell over?

Mr. ROBERTSON.—Oh, now, I object to that on the ground that it calls for a very expert conclusion that this witness couldn't possibly testify to unless he is qualified.

Q. Well, how heavy is that whole bail?

A. Well, as I said, I have never taken one of these bails off the bucket, but it forms a considerable proportion of the weight of the bucket. However, I should think that one of those bails would weigh in the neighborhood of 200 pounds.

Q. And it is hung on a pivot or iron pin on either side of the bucket?

A. On each side of the bucket.

Q. Below the center?

A. Down close to the ground, the bottom of the bucket.

Q. Was there any appliance on that bucket or on any of those buckets for pulling the bucket with either forward or backwards on the floor of the deck?

(Testimony of John G. Young.)

A. No, I can't recall any attachment. I have seen buckets of that type have handles on the side of them, but whether any of these particular buckets had any, I can't recall whether they had handles on them or not.

Q. Well, do you recall whether they had any ropes on them for the purpose of pulling them backwards and forwards?

A. No; there was no ropes on any of them.

Q. And, so far as you can recall, was there any handles of any kind on them?

Mr. ROBERTSON.—Now, if the Court please, I object to that. The witness has just stated that he can't recall; then he comes right back and asks him the same question in that way. [63]

The COURT.—Yes; objection sustained. Just ask him whether there were any handles.

Q. Well, was there any handle or any other appliance on that bucket that you know of for pulling it backwards and forward on the floor of the deck?

A. No; I can't recall any handles on any of the buckets, ropes or otherwise.

Q. Tell the jury how, if some men are down on the floor of the deck, in the hold of a vessel, preparing to receive the bucket, how it would come down to them.

A. I expect just lower it down to them.

Q. With this line?

A. Just lower it down with the falls.

Q. Have you ever been on the deck, in the hold

(Testimony of John G. Young.)

of a vessel, receiving buckets of that kind for the purpose of loading them? A. Yes.

Q. What is the usual custom or manner of receiving them when they come down?

Mr. ROBERTSON.—Oh, we object to this. We have been very lenient; it seems to me we have been extremely lenient in not objecting to some of these questions.

Mr. WICKERSHAM.—Oh, I merely want the jury to understand what the men do with the bucket when it comes down.

Mr. ROBERTSON.—Why don't you ask what those men did with the bucket?

The COURT.—You may ask what is the customary manner of loading, if this is for the purpose of general information to the jury so they can understand the situation.

Q. Go ahead and do that. [64]

A. Just make a wild grab for the bucket and get her alongside of the coal and get it in just as quickly as you can. That's about the a b c and the x y z of it.

Q. Does it make any difference which end of the bucket comes in first.

A. No, so long as it's right side up; that's the main thing.

Q. Do you know what a becket is?

A. I think so.

Q. What is a becket?

A. It's a little piece of iron they put in in mak-

(Testimony of John G. Young.)

ing up a tackle to protect the rope from chafing, as it were.

Q. Can you make a picture of it?

A. I don't know. I am not much of an artist.

The COURT.—What's the purpose—

Mr. WICKERSHAM.—One part of the defense is that there was a becket.

The COURT.—Is it necessary to go into that?

Mr. WICKERSHAM.—I think so.

Mr. ROBERTSON.—It seems to me that the dictionary is the best authority as to what a becket is.

The COURT.—Well, if he knows what it is, he can answer.

Q. Just come down here and draw a picture of it.

A. I expect that if you imagine a doughnut in your hand and peel off the outside half of the doughnut, so that you leave the hole and make a little hollow in there so as to allow a rope in, is about as good a description as I can give of a becket, to my understanding of it. All I know about a becket.

Q. In other words, it is a hole with a rim around it?

A. A hole with a rim around it that you can put a rope in. [65]

Q. Were there any beckets on this bucket or on any of these three buckets? A. No, sir.

Q. There were none. Now, you say there were three buckets being worked out of that hold that night? A. Yes, sir.

Q. And there were nine men in the hold and three on each bucket, you say? A. Yes.

(Testimony of John G. Young.)

Q. Is that right? A. Yes; I think there was.

Q. Now, what would be the rule of working the buckets? If three men worked with one bucket and sent it up, where would that bucket go when it comes back? A. It would go right back to them.

Q. It would come back to the same three men?

A. Yes; they haven't done anything since it left.

Q. What would the other bucket crews be doing?

A. They're busy filling their buckets.

Q. And then when their bucket came back, what would happen to it—the empty bucket?

A. The empty bucket goes back to the crew that sends it up.

Q. What would be done with one of these other buckets?

A. Whoever was next in rotation would take the hook and send the bucket up.

Q. What would be done with the bucket?

A. It would be dumped and returned to them.

Q. Where would it go when it came back?

A. Right back to the same men. [66]

Q. Right back to the same men? A. Yes.

Q. Then what would be done with that bucket?

A. The same routine would be gone through.

Q. Where would it go when it came back?

A. It would come back right to the same outfit and then they—

Q. (Interrupting.) Then the same bucket would come back to the same group of men all the time?

A. Yes, so long as that group kept working in that one place, but if—

(Testimony of John G. Young.)

Q. (Interrupting.) I see.

(Whereupon a recess was taken until 2 P. M.)

Monday, March 26, 1923.

Court met pursuant to recess.

JOHN G. YOUNG (on witness-stand).

Direct examination resumed by Mr. WICKER-SHAM.

Q. I wish you would look at this drawing on the blackboard now standing before the jury, and tell the jury what you had to do with making it.

A. Why, Mr. Kehoe drew it and I spotted the locations so that it would be a representation of what it was supposed to be.

Q. What is it supposed to represent?

A. That is as near as I could make it a representation of the tubs or buckets they used in unloading the ship.

Q. Is that a fair representation of the tub that you described to the jury this morning?

A. I claim it is pretty good.

Q. Yes. I wish you would explain to the jury, as near as you can now, what the various points of interest on that drawing are. For instance, what is this object that goes up [67] over the top of the tub?

A. This is what is known as the bail (indicating). This (indicating) wasn't long enough, so we put on a "hickey" here with a hook engaged to lift the tub.

(Testimony of John G. Young.)

Q. That would be an object, then, with a hook on it?

A. No; not with a hook, but simply an eye, but the hook would hook into it.

Q. What is this bail made of?

A. The whole thing is iron, with the exception of this fligree stuff here. That is supposed to be rope.

Q. Did you tell the jury how large that bail was, this morning?

A. Why, I gave the general dimensions of it, I think.

Q. Well, just repeat them briefly.

A. It was about four feet from this point here to the top, with a width across, I should say, better than three feet, and down on this side.

Q. It comes down on this side of the tub?

A. Yes; to correspond with this. That is why we put the shaded line there.

The COURT.—The dotted line.

Mr. WICKERSHAM.—The dotted line.

The WITNESS.—Yes.

The COURT.—Represents the under side of the bail?

The WITNESS.—Yes; this would be the under side.

Q. Now, these objects below the bucket here, what are they?

A. Now, then, we mentioned the rollers for the movement of the tub in this direction (showing) you see. We put these little rollers up here. They were solid rollers, probably four inches in diameter.

(Testimony of John G. Young.)

There are two in front and one sits [68] in the center of the back.

Q. How wide are those rollers? How long are they?

A. Three or four inches long—small wheels.

Q. They were small wheels, but they were long.

A. No; they were about—looking across the bucket this way, they were about four inches probably.

Q. Four-inch tread?

A. Yes; four inches wide; tread is about four inches.

Q. What is this object which looks like a chain?

A. We put that in there to represent the rope that I spoke of this morning. It was fastened to this latch device.

Q. Yes.

A. And this circle here represents an iron nub that sticks out in this manner so that when the bucket is dumped, this nub engages with the bail up here (indicating) and keeps the bucket from going all the way through like a wheel.

Q. This round spot here, then, is a nub or projection on the bucket?

A. Yes; it sticks out there about that far probably (showing).

Q. Now, explain to the jury what this object is here on the right-hand side of the bail?

A. Well, that is the latch that we speak of. This is what holds the bucket. When it is in this position (indicating) it holds the bucket locked and

(Testimony of John G. Young.)

when it is pulled out in this direction (showing),
so that it is—I don't know, probably not so much;
but the idea is, when you move it that way, you unlatch the bucket to dump it.

Q. Did you say how high that bucket was, Mr. Young? You did this morning, didn't you?

A. Yes; it would be in the neighborhood of that high (showing). [69]

Q. It would be larger than the representation on the blackboard, wouldn't it?

A. Oh, decidedly; yes.

Q. How much coal can be handled in that bucket at one time?

A. How much coal? Oh, it would probably hold eighteen or nineteen hundred, seventeen. I really don't know.

Q. You mean pounds? A. In pounds; yes.

Q. You spoke about something being broken on that trigger this morning. Show the jury what that was. Explain to them.

A. There was two buckets made as this picture is, with a little lanyard fastened here (showing), that I had made fast here after dumping the bucket, and one bucket was broken right off across here as though at some time or other this handle came down here, got fouled and got wrenched out; then when they tried to straighten it out it had broken off right there. That is what the fracture of the metal indicated—that it had been broken off by trying to straighten it out.

(Testimony of John G. Young.)

Q. That was what you spoke about in your testimony.

A. That was the missing part on the handle that hangs down.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Just step down here, will you please?

(Witness does so.)

Q. I wish you would take the ruler and explain the situation to the jury. As I understood you this morning, you were the man on the hopper? [70]

A. Yes, sir.

Q. Now, when the bucket came over to you with coal, you were the man that dumped the bucket?

A. Yes, sir.

Q. Just explain how it was you dumped that bucket; that is, a bucket like you had down there. How did you operate the trigger?

A. Why, in the first place, the bucket comes to me; swings through the air.

Q. Yes.

A. And I have to get hold of that bucket and steady it and turn it so that when I release the catch, it will dump into the hopper; that is, square with the hopper; otherwise, it would get away from me because of the pitch of the coal. If I had it pointed towards me, I couldn't control it. So I have to stand alongside of the bucket so-fashioned, let it swing past and, as I release the trigger to let the bucket dump, it starts to dump there, and that

(Testimony of John G. Young.)

is the way I have control of it. When the bucket is dumped, when the bucket has dumped its load, it is heavy enough on the back end to swing up into the normal position and I still have hold of it. Sometimes it doesn't answer quickly on account of coal sticking in it, which destroys the balance; then I have to help it out to get it into position so that this latch will engage and then I have to take this lanyard and make it fast.

Q. In pulling the trigger, do you pull your lanyard towards the nose of the tub or towards the back of the tub?

A. Towards the nose of the tub. [71]

Q. Now, as to the triggers on these tubs which you are referring to on March 8, 1922, on the "Latouche," was the trigger on the tub between the bail and the nose of the tub or between the bail and the rim of the tub?

A. Between the bail and the nose of the tub.

Q. Are you positive about that? A. Certainly.

Q. Now, wasn't the trigger— As a matter of fact, didn't the trigger come back in this fashion (showing)? A. Not at all.

Q. It didn't? A. No.

Q. Do you recall that clearly?

A. Certainly. This is where the load is (indicating). If the trigger isn't on this, you can't hold it.

Q. This particular picture that you have here you drew from another picture that Mr. Kehoe had of a cut?

A. Mr. Kehoe used the other picture to help him

(Testimony of John G. Young.)

in the design, to get the perspective correct or nearly so.

Q. Now, on the tub in question wasn't the axis also a little higher on the tub? Was the axis that far down?

A. Yes; it is possible that the axes on the tubs under discussion were not quite as low as that. I mentioned that, and we had it down here a little bit lower, but we raised it up. I didn't want to raise it up too high because then it would be above the center of gravity and it would be open to the same criticism that it wasn't correct, so I just left it a little bit low.

Q. And the radius of the handle or bail, was that four feet or [72] three and a half feet?

A. Well, that is figuring it pretty close. I couldn't tell you; I never measured it.

Q. You wouldn't say it wasn't three and a half instead of four feet?

A. No; I wouldn't pin myself down to within six inches. I never measured it.

Q. Now the tub has, on each side, an iron projection here that extends out a distance of about three inches, does it not—two and a half to three inches or so? A. In that neighborhood; yes.

Q. Now, as the bail comes back, the bail rests on that projection, does it not?

A. Comes down and reverses itself.

Q. And comes down so that the bail rests on that projection on either side; is that not true?

A. Yes; but you are speaking about dumping the

(Testimony of John G. Young.)

bucket. As you dump the bucket, as the bucket is suspended from here (indicating) the bail or handle that comes around and hits this nub.

Q. Oh, certainly; I realize that, but this is on the ground. If the tub is on the ground, like you have got it here and not in a suspended condition, but simply on the ground, that bail comes back; it comes back and rests on that projection, does it not, on either side—hits that projection on either side—that little peg (indicating)?

A. No; I don't think it will.

Q. What is to prevent it? It does when it is in the air.

A. It does when it is in the air; yes; but then this is up in the air and the bucket swings through the air. [73]

Q. The bucket—

A. (Interrupting.) In this case here, when you have that bail laying down on the ground, it extends out beyond here (indicating).

Q. In other words, you think that the bail extends—that what is now the top of the bail would strike the ground before the line of it could get down to the peg, is that it? A. I think so.

Q. The back of the tub has one wheel and the front two wheels? A. I believe so.

Q. And there is a very pronounced front and back to the tub, is there not? A. Certainly.

Q. As pronounced as you have drawn it in your picture. That is to say, I mean by that, that the

(Testimony of John G. Young.)

tub has a pronounced lip or dip to the front part; is that not true?

A. Well, the elevation of the front is as high as it is at the back, but I don't think there is any mistaking the front for the back of the tub.

Q. The line of the back of the tub is practically vertical, is it not, as you have drawn it here?

A. Approximately; yes. It may change a little bit.

Q. It may change a little bit with the curve at the bottom, but it is practically vertical in the general direction of the back? A. Yes.

Q. The front of the tub is practically— Is the lip practically as you have drawn it there?

A. Approximately; yes. [74]

Q. I think I understood you to say this morning that in your experience as longshoreman you had probably unloaded several hundred tons of coal. Is that correct, Mr. Young? A. Yes.

Q. When you say several hundred tons, how many hundred tons do you mean by that, approximately 300 or 500, or what do you mean by several hundred tons? A. Well—

Q. I just simply want to know your estimate.

A. It's rather hard to do. A man would have to figure out—when you bring it out that way a man would have to have access to the pay-roll and find out how many hours he had worked over a long period of time and then he would have to take his average capacity for work and find out that way. A man, an ordinary workingman doesn't stop to

(Testimony of John G. Young.)

think how many hundreds of tons of coal or freight or whatever else it may be, he has handled in two or three years.

Q. But I asked you what you mean by several hundred tons? A. Well, call it 300 tons.

Q. 300 tons? A. I expect so; yes.

Q. That is to say, you mean that you yourself have personally shoveled three hundred tons of coal? A. I believe I have.

Q. And over a period of how many years does that extend?

A. Well, I gave you a time this morning of 18 months. That would be during the winter months—six or seven months in the year over a period of three or four years.

Q. Was that all in the port of Ketchikan?

A. No, sir. [75]

Q. Where else besides in Ketchikan?

A. I shoveled coal in Juneau.

Q. Where else?

A. Well, I shoveled coal back East; I shoveled coal in Michigan.

Q. On boats?

A. No, I never worked on boats in the East.

Q. Well, now, I mean, when you talk about shoveling coal, I mean how much coal you have shoveled here in Ketchikan or in Juneau, where the conditions would be—

A. (Interposing.) Practically the same?

Q. Practically the same.

(Testimony of John G. Young.)

A. Why, I have never shoveled any coal here aboard ship in Ketchikan.

Q. You never have? A. No.

Q. That is to say, during all the time that you have worked in longshoring here in Ketchikan, you acted as hopper man, did you not?

A. No; not always. I only worked once on a hopper.

Q. In what capacity were you acting on those other occasions?

A. Those other times I handled freight; sometimes worked in the ship and sometimes on the dock.

Q. Now on this particular day what time did you go to work?

A. I believe it was about one o'clock.

Q. One o'clock in the daytime?

A. Daytime; yes.

Q. Was that when the "Latouche" first started to discharge coal? A. Yes.

Q. Who was in the hold working at that time?

A. Oh, I don't know. I believe there was a crew working on [76] it at the time.

Q. You think it was the crew? A. Yes.

Q. How long did you work?

A. I worked till midnight.

Q. What did you do after midnight?

A. I went home and went to bed.

Q. When did you next come back down to the boat?

A. The following day, about, oh, I don't know—somewheres around noon.

(Testimony of John G. Young.)

Q. You came down about noon the next day?

A. Yes.

Q. How long did you work there then?

A. I didn't go back to work.

Q. You didn't go back to work on the ship?

A. No.

Q. Was the ship discharged at that time?

A. She hadn't been discharged, but I think they only had to work a half an hour over, and instead of putting a new crew to work they just let them get through.

Q. The old crew were on and finished it?

A. Yes.

Q. You remember how many tons of coal they discharged at that time or had to discharge?

A. Why, I think it was in the neighborhood of 400 tons.

Q. About what quantity of coal did the ship discharge an hour during that occasion when you were working there?

A. Why, it would probably run about 18 tons an hour.

Q. About 18 tons an hour? [77]

A. They might have done better than that at times.

Q. In other words, what would be the maximum quantity, you think, per hour?

A. I don't think they would run more than twenty.

Q. Between eighteen and twenty tons an hour

(Testimony of John G. Young.)

would be about the maximum at any time during that period?

A. Yes; I imagine so. Of course, I don't know. I wasn't on the scales or anything like that, but just the way I feel about it.

Q. Well, you judge that from your experience in handling coal yourself and your experience as a hopper man and all those things? A. Yes; sure.

Q. Now, then, did each tub have a capacity of about six tons per hour?

A. I think it would be about that. The tubs follow one another. If one man isn't ready, the crew waits until that tub takes its rotation, except in the case of an emergency.

Q. Now, then, at the time that you quit at midnight, I presume the entire longshoring crew also laid off for their supper or their lunch or dinner?

A. Yes; we all knocked off for supper.

Q. At that time whereabouts was the crew working? What I mean, Mr. Young, to make it clear so that you will understand me, is how far down in the hold had the coal been removed?

A. They got down to the first deck and they had cleared out a little space in the forward half of the hatch.

Q. That is what is known as 'tween-decks?

A. I should say; yes. [78]

Q. And had all the coal lying immediately below the hatch itself been removed at that time?

A. No; my recollection is that there was a bank there five or six feet wide at the top and it sloped

(Testimony of John G. Young.)

down like that (indicating) and it was probably five feet deep. Might not have been quite five feet deep.

Q. How far did it extend from the forward—from a line lying under the, perpendicularly under the forward combing of that No. 2 hatch? How much aft of that do you think the line of coal extended at that time?

A. It didn't extend from the forward portion of the hatch aft. It extended from the after portion of the hatch forward.

Q. Well, I may not express it in a very seaman-like way. I am not a seaman. What I am trying to get at, so you will understand me, is what hatch were you working in?

A. I don't know how they number the hatches on that boat.

Q. Well, if No. 2 hatch is the hatch in the center of the ship is that the hatch they were working? Was it the hatch in the center of the ship just in front of the pilot-house and the cabin?

A. No; I really don't know. The deck was covered with a deck load. I don't know how the hatches are on that boat. There was one hatch open; whether there was more hatches on the boat, I couldn't tell you.

Q. Did you assist in unloading the powder that was taken off that trip?

A. No, sir; I didn't touch any powder.

Q. Then, you don't recall where the coal was that they were unloading? [79]

A. Yes; I know the way the coal laid in the hatch

(Testimony of John G. Young.)

that was open, but whether it was hatch 1 or hatch 2, I can't tell you.

Q. How far was the coal that was being taken out at that time— Did the pile extend out underneath the opening of the hatch or had the line of the pile by that time receded back in, so that the men, to get the coal, had to go underneath? A. Yes.

Q. How far back underneath do you think they went?

A. The coal had been dug out under the deck going forward.

Q. How many feet?

A. Well, it was dug out so that I couldn't see the line going forward. At my distance above the boat there, my angle of vision wasn't very— You know, it was rather sharp. I couldn't see under the deck that far.

Q. How far above the deck of the boat were you?

A. At times probably forty feet.

Q. At times forty feet, depending on the tide during that period? A. Yes.

Q. Were you in a position to see the men themselves? A. At times yes.

Q. Now from six o'clock in the evening on, what men were at work in the hold?

A. I really don't know who were working in the hold.

Q. Did you see them down there?

A. I could see figures.

Q. But you don't know who they were?

A. No; I don't. [80]

(Testimony of John G. Young.)

Q. You don't know whether McHugh was working there or not?

A. No; I don't know whether McHugh was on the boat or not.

Q. Now, then, after they got down to where the pile was after worked out, under the opening underneath the hatch itself, what method did they use relative to assigning any particular place for each subcrew of three men to work? I understood you to say this morning that three men were assigned to a tub and that they kept that particular tub?

A. Yes.

Q. Now, then, at what place did those particular men work?

A. I didn't assign the men. I don't know who assigned them. As a matter of custom, they throw a shovel at you and you grab it and go into the hold and look around at the men and you see a man at a bucket and you like the looks of this man, you work with him, and if you don't, you try and work with somebody else. I don't know whether those men were assigned to work together, or anything about it.

Q. I think you probably misunderstood my question. Possibly my question was not very clear. What I meant, Mr. Young, is this: there were three tubs working in the hold unloading coal.

A. Yes, sir.

Q. Did each tub, with its crew, go hit-or-miss fashion, or did for instance, No. 1 tub, we'll say, take the starboard wing of the hold, No. 2 the mid-

(Testimony of John G. Young.)

ships of the hold and No. 3 the port side of the hold, or how do they do about that?

A. Well, just as you work along, unless somebody gave you instructions to work out a certain wing first, then the other side. You just keep poking along, getting rid of the coal. [81]

Q. So that the tub starting in amidships would keep working out that and the tub that started on the starboard wing would keep working there and the tub with three men on the port wing would keep working there? A. Just keep poking along.

Q. That is the ordinary custom, is it not?

A. Yes; agree the best you can.

Q. Now, then, in the experience you have had in discharging coal in Ketchikan and Juneau, the ordinary method of discharging coal is by means of tubs, is it not? A. Yes.

Q. Such as you got here?

A. Well, I have used tubs of that nature and description and other circular tubs, some deep and some shallow.

Q. Some of the companies use the old wooden tubs, do they not? A. Yes; sometimes.

Q. The Alaska Steamship Company used the iron tub something on the order that you have drawn your picture of here, do they not? Is that your recollection?

A. Yes; I think the Alaska Steamship Company use that. Once upon a time the old B—— line used to use the round tub.

Q. But that's some time ago?

(Testimony of John G. Young.)

A. That is a little while ago.

Q. How many iron tubs in that period, do you suppose that you personally have worked with?

A. That is a peculiar question to ask.

Q. Well, you say, Mr. Young, that you have had a good deal of experience in this work; that you have personally shoveled [82] and discharged 300 tons of coal? A. Yes.

Q. And, of course, I don't expect you to be able to say down to one or two or five of them, but I would like to have an idea of what your best judgment on that question is, as to how many of those tubs you have had experience with?

A. Well, now, if the "Latouche" comes up here three times and she uses the three same buckets, have you used three buckets or nine buckets or have you only used one bucket? You might chance to use the same bucket each time she comes up here.

Q. Well, give us an idea.

A. I rather imagine that I have used, handled or helped to load those different kinds of tubs, of that particular description—round ones that were high, round ones that were shallow and the wooden ones.

Q. How many did you say, or did you say the number?

A. I said I used those different types of tubs.

Q. But you can't recall the number?

A. No; I wouldn't hazard a guess under oath like this.

Q. Now, then, when the tub has been loaded, how do you get the tub back out, say for instance at

(Testimony of John G. Young.)

twelve o'clock P. — or just the last trip that was taken out before twelve o'clock, when they were working underneath in the hold down below the open space of the hatch, how was it done? After the tub is loaded, how is it taken back out of the hold?

A. Why, the winch driver goes ahead on his two falls; equalizes the strain on the two falls and then takes one faster than the other and takes it over to the dumping spot. [83]

Q. What is done with the bail?

A. The bail is hooked on to the— The hook from his hoisting gear is hooked into the bail.

Q. The bail is left in a vertical position?

A. Usually; yes.

Q. Will it stand when it is first hitched on?

A. Should be.

Q. How? A. The bail has got to be vertical.

Q. Now, assuming, Mr. Young, that this line here represents the open hatch. The open hatch comes out here— A. Yes.

Q. And we have got the tub in this instance, loaded with coal. A. Yes.

Q. Now, tell the jury what method is used to get that loaded tub out.

Q. You want to take it out by hand?

Q. I want to know what is the customary method of taking that loaded tub out of the hatch, out of the hold.

The COURT.—He means, start from the face of the coal in the hold.

(Testimony of John G. Young.)

Mr. ROBERTSON.—Yes.

A. A bucket of that size, if I were handling it, I would hook on the gear with the bail down.

Q. Yes, sir.

A. And pull the bucket up.

Q. In other words, the bail is brought over here, is it not (indicating)? A. Yes.

Q. And you hitch on the bail; you hitch on the bail then you [84] hitch on your tackle, your hook from your falls, with the bail out here, is that not correct?

A. Yes; that is the idea when you are that far out from the combing.

Q. And then he pulls it out?

A. Your hoistman then hoists or pulls it out. You have to walk alongside of your bucket and then securely latch your bucket so that he can take it out.

Q. Then when you get out over to where the hatch is, by the time you get out to where the hatch is, the bail, as it goes, gradually swings around in an arc until it becomes in this position (indicating), is that not true? A. That is the idea.

Q. And automatically locks, does it not?

A. It should.

Q. And then you put the becket on over this peg here, don't you?

A. Then you should make your lanyard fast.

Q. You fasten your lanyard over this peg, the same peg that you also use—that is, it is one of the pegs that is also used as a matter of fact, to

(Testimony of John G. Young.)

stop the swing of the bucket around when it is eventually dumped in that condition? A. Yes.

Q. And then it rises in a vertical position, is that correct? A. That's the idea.

Q. Now, then, how is a loaded bucket taken out by hand?

A. You have to drag it out if you are going to take it out by hand.

Q. Is it customary to drag it out by hand? [85]

A. It all depends where you have got to go. If you are only a few feet from the square of the hatch it's easier for three men to surge against that bucket and boost it those couple of feet than it is to go up and pull your heavy gear in and take your bail down and take it out by machinery.

Q. Do they pull it out or push it out?

A. Just whichever way your weight will count best.

Q. Now, then, on these buckets, right here where I have put this little line there (pointing), or approximately in that position, Mr. Young, on each side, isn't there an iron handle there?

A. Well, I would say this moment that I have no recollection of handles of any description on any of those tubs. In my work up there on top of those machines, that hopper, I did not wait to get hold of a handle, because I have got a two-foot platform to stand on, and if I get hold of anything, you know, with a firm grip on a handle, in case of anything letting go and the bucket getting away from me, I can't let go of that handle quick

(Testimony of John G. Young.)

enough; so for that reason and the fact that I didn't use them, the position of any possible handle is not clear in my mind, because I didn't use them. I would simply take the side of the bucket or the bail as it came by to steady it.

Q. Well, while you don't have any recollection of these three particular buckets, as a matter of fact on most of the iron buckets, they do have such handles on the lip?

A. Very rarely that I have seen rope handles.

Q. I am not speaking about rope handles. I said an iron handle up there (indicating); an iron handle where I put this mark. [86] Isn't that correct? When I say an iron handle, Mr. Young, I mean something about like that, so you can put your hand in and pull it along, like that (showing). I don't mean an iron handle protruding or something sticking away out here.

A. Well, there might be.

Q. On that point you simply don't recall as to whether there were or were not? A. No.

Q. Is that true? A. No; I can't recall.

Q. You had no particular occasion to note that?

A. No.

Q. Now, how soon after you started to work was it that the first bucket that was brought up hit the side of the hopper and dumped into the bay?

A. Why, I don't know how many minutes it was after we started to work. When I started to work the mate hollered up from the deck—at least I think it was the mate—somebody apparently in

(Testimony of John G. Young.)

authority—shouting up to me to center the boom, to center my boom, which I did. It took a few minutes to get the boom lowered out and the braces set up so as to hold her reasonably fast or rigid, and after that little interval, my recollection is that we hoisted an empty bucket to see if I had centered it, and that was satisfactory to the winchman, and we sent the empty bucket down and we started with a full load and my recollection is that the first full load that came up was dumped right there, as I said this morning, partly into the bay and partly on the dock, and probably some of it went aboard the ship.

Q. The first full load, or the first bucket containing the [87] first full load, struck the side of the hopper? A. Yes.

Q. Now, is that a very unusual occurrence, Mr. Young, when you are first preparing your work and getting it started to have a tub dump?

A. Under the circumstances; yes.

Q. Why under the circumstances?

A. Why, the position that the bucket was in.

Q. I see.

A. The bucket was away up near the point of the boom. The tide was low and it was taxing the capacity of the boom to clear, that is to hold the bucket up there (indicating) enough to clear the top of the hopper.

Q. Which side of the bucket struck the side of the hopper?

(Testimony of John G. Young.)

A. My recollection is that the bucket struck lip-on to the side of the hopper.

Q. Your recollection is that it struck lip-on?

A. Yes; that is my recollection.

Q. Did it strike a gentle blow?

A. No; it hit it a fair rap.

Q. Hit it quite a little bump?

A. I hung on, on where I was.

Q. You were jiggled around? A. Yes.

Q. I presume you were wondering what was happening?

A. No; I knew what was happening. It was coming off right at my feet.

Q. How much of the coal did it spill out?

A. The bucket emptied. [88]

Q. It emptied all of it out?

A. All the coal; yes.

Q. Did it turn it back so that the tub swung up in an arc?

A. The tub just flipped around and went up to nearly the normal position.

Q. Even a tub in the ordinary good condition might have that happen to it, might it not?

A. Oh, I expect you could make most anything happen if you handle it roughly enough.

Q. Well, that was a pretty rough jar that tub got? A. Yes.

Q. You got a rough jar where you were standing up near the hopper?

A. Yes; the whole apparatus got quite a jar; yes.

(Testimony of John G. Young.)

Q. Were you much astonished to think that the tub dumped its coal?

A. No; I would have been astonished if it hadn't dumped.

Q. Now, how many more times during that afternoon were any of the tubs dumped into the bay?

A. Well, that is rather a hard thing. I didn't hold a stop watch on them.

Q. I didn't say the time. I asked you how many more, or at least, I meant to say how many more that afternoon. How many more tubs of coal were dumped into the bay that afternoon?

A. That is a hard thing. I couldn't tell how many were dumped; several tubs were dumped.

Q. Several?

A. Several. One in particular dumped in mid-air, without having [89] touched anything.

Q. Now, then, we get back to that word "several" again. When you say several, about how many do you mean? It's so very indefinite. I can't tell how many you mean, and I don't think the jury can, or anybody else.

A. Well, I guess ordinary folks have got an understanding of what the word "several" means. If it gets up into the hundred or something, I suppose a man would say a hundred or more got upset.

Q. You mean there was a hundred tubs of coal—

A. (Interrupting.) No; I don't mean a hundred. I mean that the average, ordinary mortal like myself would say several if he meant, you understand, a few.

(Testimony of John G. Young.)

Q. Well, I know, but would you say it was five?

A. I would would not say there was not more than five. I wouldn't be at all backward about claiming that there was five dumped, though.

Q. Would you say there was not more than seven?

A. No; after this interval, I wouldn't care to make a definite statement. There was several buckets dumped. I believe there was five. I know there was the one that I speak of that struck the hopper and one more that dumped in midair. That's two. That only leaves three for the balance of the twelve hours.

Q. On other occasions when you have been unloading coal, you have also seen tubs spill out some?

A. Once in a while you would see a tub dump.

Q. Now, in this work, were you what is known as the longshoremen boss?

A. That's too deep for me. [90]

Q. Well, now, in a crew unloading ships here, discharging coal in March, 1922, the first of March, as a matter of fact wasn't the man on the hopper always known as the longshoreman boss?

A. No.

Q. Wasn't that the position—

A. (Interrupting.) No; the longshoreman boss' position was under the roof.

Q. Did you have a longshoreman boss on this occasion? A. Yes; I believe there was.

Q. Who was that?

A. A man by the name of Pauzi.

(Testimony of John G. Young.)

Q. What was his name? A. Pauzi.

Q. Was he present there all during this time?

A. I believe he was.

Q. Were you employed as a longshoreman? Was that your work, I mean to say, as hopper man, employed as longshoreman?

A. I was put to work to go up there on the hopper and dump those buckets.

Q. Did Mr. Pauzi put you to work there?

A. Yes; Mr. Pauzi asked me if I wanted to go to work and I asked him where, and he said if I wanted to, I could go up on the hopper, and I told him all right, I would go on the hopper.

Q. Mr. Pauzi came around and located you and sent you down to the ship. Is that correct?

A. Why, I think I came walking on the dock and he shouted at me or called me over. [91]

Q. Now, at six o'clock did you leave for your supper or your dinner?

A. Yes; at six o'clock that night.

Q. Yes.

A. We knocked off. I think it was six.

Q. And did the crew knock off at that time?

A. The men in the hold also.

Q. What time did you go back to work?

A. I think it was seven o'clock.

Q. When you went back to work was there a new crew in the hold? A. No; I don't know.

Q. When did the crew of longshoremen go to work discharging the vessel?

A. Well, distinguishing between the crew and

(Testimony of John G. Young.)

the longshoremen, I couldn't do that. I don't know who were members of the crew nor who the longshoremen were.

Q. I understand you to say, then, that, as a matter of fact, you don't know that any of the crew of the vessel itself did any of the longshore work. Is that correct?

Q. I have an understanding that that was the case, but I really don't know. I don't know the individual members of the crew on that tub and I don't know whether any of those men were working in the hold. I have been told—that same day I was told that the crew would work until six o'clock and they would hire longshoremen, then, to finish this work; finish the shift, because they could work the crew until six o'clock at the regular pay and then they would have to pay overtime; so that was the way they were going to work it; work the crew until six o'clock and then put the longshoremen [92] on.

Q. But you don't know whether that happened or not?

A. Whether that happened or not, I don't know.

Q. Now, then, during the time that you continued to work, up to twelve o'clock, how many tubs were in operation?

A. Well, when we knocked off at midnight, there was three tubs in operation.

Q. How long had you been operating with three tubs?

(Testimony of John G. Young.)

A. Oh, I really can't tell you when we started operating with three tubs; that is, working steady with three tubs. When we first started unloading the ship, we started with three tubs to break down the hatch and one tub developed a radical way of behaving, so that tub was thrown to one side, because the men working in the square of the hatch, you know, there was no protection, and the tub was thrown to one side and we worked with two tubs, and the men split up and did the best they could to get along peaceably, and after, when they got the hold opened up so that they could get down and have room for the three buckets—at what time that happened, I don't know—but this third bucket came back into service.

Q. When they broke into the cargo of coal immediately under the hatch at first, there was ample room for all three of the tubs, was there?

A. Well, hardly in the beginning.

Q. Hardly in the beginning? A. No.

Q. Now, then, would you say— Does your recollection say whether or not the three tubs were working all during the evening at the time you went back on shift after supper, at [93] seven o'clock?

A. My recollection is that from supper time on, the three tubs were working. It was some time during that afternoon that they got the coal broken down to the hatch covers, or between decks so that they could spread out a little bit and get to working out into the wings.

(Testimony of John G. Young.)

Q. Yes, sir.

A. But what time that took place, I couldn't tell you.

Q. Now, then, did I understand you to say that this crew of nine men in the evening only had a lantern to work by?

A. No; I didn't say that they had a lantern to work by.

Q. What did you say? You said something about it.

A. I said that I had the lantern to work by.

Q. Oh, you had a lantern up on the hopper?

A. Yes.

Q. Were you down in the evening, down where the men were?

A. No; I didn't go aboard the ship until I went to get paid off.

Q. That was the next day? A. At noontime.

Q. At noontime the next day? A. Yes.

Q. How far distant were you— Well, I think you said a moment ago that, depending on the tide, you were distant up as much as forty feet away from the men. Is that what I understood you to say?

A. Yes, I expect it would probably amount to forty feet at that time, at times.

Q. Do you know whether or not there were lights down in the hold? [94]

A. There were lights down in the hold.

Q. What kind of lights did they have down there?

(Testimony of John G. Young.)

A. Why they had a cluster of lights. I imagine there was four lamps in the cluster—small lamps.

Q. Electric lights? A. Electric lamps; yes.

Q. Might there not have been as many as five globes in the cluster?

A. There might have been; yes.

Q. Where was this cluster of lights hung?

A. One cluster was hung right alongside of the midship stanchions on the forward square of the hatch.

Q. That is, that would be,—if they were standing on the 'tween-deck, it would be just above?

A. Just above your head level, or about your head level.

Q. There was a cluster of lights hung on the coaming of the hatch right below where the winchman stood, was there?

A. Well, that is where the winchman stood.

Q. Oh, that is where the winchman stood?

A. I believe so.

Q. Oh, you mean if the lights—

A. (Interrupting.) Yes, I believe there was one cluster of lights approximately under his feet.

Q. Yes, sir.

A. Fastened against the midship stanchions; and I think also there was a light diagonally across the hatch fastened against the coaming, on the after coaming of the hatch, on the starboard side.

Q. Would you say that there weren't two clusters hung there, along where the winchman was—that is to say, just below him? [95]

(Testimony of John G. Young.)

A. Well, now, there might have been two clusters hanging back to back there.

Mr. WICKERSHAM.—You mean underneath the deck on which he stood?

The COURT.—I think he meant on the deck.

Mr. WICKERSHAM.—That's what I wanted to find out.

Q. I mean, Mr. Young, the winchman, which deck does he stand on?

A. He stands on the main deck, I understand it is.

Q. The winchman stands on the main deck?

A. Yes.

Q. The coal was on the 'tween-deck?

A. Yes.

Q. That is just below the main deck, is that not true? A. I believe so.

Q. The winchman operated his winch right aft of the hatch, did he not, where you were breaking into the coal? His winch was just to the rear of the end of the hatch, isn't that correct?

A. We were using the forward booms. We weren't using the after booms. How would they have the after winch hooked up on the forward booms?

Q. I don't mean—

A. (Interrupting.) It wouldn't have to be the after winch or the forward, but it would have to be the after hatch.

Q. When you got the hatch cover off, where did the winchman stand with reference to that hold?

(Testimony of John G. Young.)

A. I think the winchman stands pretty close to the edge.

Q. Pretty close to the edge; and which way is he facing—towards [96] the front part of the ship? A. No.

Q. Or towards the stern of the ship?

A. He is facing the stern of the ship.

Q. And then the aperture of the hold is right at his back?

A. No; he is facing the stern of the ship and the hatch is open in front of him.

Q. Was the coal that was broken down and taken out from this hole after you cleared it out, right underneath the hatch itself? Did the coal pile extend, that you were working on, I mean—

A. (Interrupting.) Yes.

Q. Did it extend forward or sternward?

A. The coal that they dug into, they were working in a forward direction after the coal.

Q. They were going towards the bow of the ship?

A. They were going towards the bow of the ship after the coal.

Q. And from where the winchman stood—

A. (Interrupting.) He would be underneath it.

Q. If you were standing where the winchman stood at that time, would it have been possible for you to have seen up towards where the men were working?

A. No; you would have to see around two corners.

Q. What two corners?

(Testimony of John G. Young.)

A. The corner of the deck here (indicating) and the corner going back under.

The COURT.—In other words, the men were working directly under the winchman?

The WITNESS.—Almost directly under the winchman.

Q. They were almost directly under the winchman. Is that it?

A. I would say that that is just about where they were— [97] underneath him; that is, they weren't exactly underneath him. As they were clearing out the wings, they were spreading out, but they were working by in a line past him.

Q. Now, then, going back to the lights again, you don't know how many lights were down in the hold itself? A. Altogether I couldn't tell you.

Q. You couldn't see them, could you?

A. My recollection is that there was a couple of clusters.

Q. You stated that there was a glare that you could see from where you were on the hopper?

A. Yes, there was a glare. I was standing practically in the darkness, you see.

Q. You were standing in the dark? A. Yes.

Q. And the glare hurt your eyes?

A. Oh, I wouldn't say that it blinded me, but it was a very pronounced light against the total darkness all around.

Q. From where you worked you could see the men?

A. Whenever I would get out to the edge of the

(Testimony of John G. Young.)

platform I had to stand on, I could look down to the hold and if any men were moving around in the square of the hatch, I could see them.

Q. Could you see the buckets down there?

A. At times, yes.

Q. Did I understand you to say that you knew none of the men of the crew except Mr. Pauzi? I mean of the longshore crew.

A. Why, Pauzi was working on the dock.

Q. You knew none of the names of the longshoremen working down in the hold at all? [98]

A. No; I didn't. I didn't know any of them. There might have been men working aboard the boat that I knew well, but I didn't know that they were aboard the boat and I didn't distinguish them.

Q. Were some of them Indians?

A. That I couldn't tell you.

Q. You weren't there when the accident occurred?

A. No, sir.

Q. You left how soon after twelve o'clock? Did you leave immediately? A. Yes; right shortly.

Q. Where did you go—home? A. I went home.

Q. Did you come uptown or something like that?

A. I said I went straight home. I don't believe I stopped to eat. I went home.

Q. On these tubs, was there anything on the lip of the tub by which the hook from the tackle or the falls, whatever you call it, can be hooked on that and the tub pulled forward that way?

A. No; I don't think I ever saw a bucket rigged up that way.

(Testimony of John G. Young.)

Q. Never saw one rigged that way at all?

A. No.

Q. And at the back there is one wheel?

A. Yes; there is one wheel. We tried to draw it in there about where it belongs.

Q. Is that represented here?

A. Yes; that (indicating) is supposed to represent the hind rollers.

Q. The forward two rollers? [99] A. Yes.

Q. Diameter of about five or six inches about, are they?

A. No; I wouldn't say they are that large. I don't think they are five inches.

Q. You wouldn't say they weren't five inches?

A. I never put a rule on them. I calculated them.

Q. And they are about an inch or two inches in thickness, are they not?

A. You mean the tread?

Q. Yes; the tread.

A. Oh, no; the tread is more than that.

Q. I mean—I don't know the right term.

A. The surface that would run on the ground?

A. Yes; the surface.

A. Oh, the surface that would run on the ground or deck, I believe, would be about four inches.

Q. About four inches?

A. Yes; it might be three and a half.

Q. Now, Mr. Young, I want you to refresh your memory again about where the winchman stood. Isn't it a fact that the winchman on the "Latouche,"

(Testimony of John G. Young.)

up there discharging that cargo that night stood astern of the hole, that is astern from the hold and that from where he stood, or if you had stood there, or anyone else, you could look down and look forward and look underneath where the men were working?

The COURT.—You mean, abaft the hold?

Mr. ROBERTSON.—Pardon?

The COURT.—You mean abaft the hold? [100]

Mr. ROBERTSON.—Yes, sir.

Q. Isn't that correct. Let me just draw a little diagram. I'm not much of an artist, but just to show you what I mean.

The COURT.—He can understand that.

The WITNESS.—The jury won't, though.

Q. This is the bow and this is the stern and this is the hatch (indicating). A. Yes.

Q. The hold of the hatch. If the winchman was standing on the sternwardside of that hold instead of on the forward side of the hold, isn't it true that from his position he could look forward down to where the men were working down in here (indicating) and down in there?

A. If the winchman was standing abaft the hatch, why certainly he could look forward a certain distance along between decks, but if you ask me to say that he was standing there, I can't make a statement like that and have it jibe with the fact of the forward boom being used. How would they let their falls aft of the hatch and clear the hatch so that they could use the after winches?

Q. Where do you claim the forward falls were?

(Testimony of John G. Young.)

A. I claim they were using both booms.

Q. Where do you claim that was—abaft or forward?

A. The front booms were extending from the foremast.

Q. What is their position relative to that hold?

A. That would be on the opposite side of the hatch from the winch driver.

Q. On the opposite side of the hatch from the winch-driver. A. Yes; surely. [101]

Q. Well, as a matter of fact, you don't know at this time whether or not the winchman was standing abaft the hatch or forward of the hatch, do you? You don't know that, do you?

A. I claim that the winch-driver's position was forward of the hatch.

Q. In other words, you claim that he was forward of the hatch and that below, on the 'tween-decks, the men were working forward of that line, of a line that would go up and down there along from the hatchway there. Is that right?

A. Here's the men down in the hold (indicating), having got clear of the coaming of the hatch. They would be working forward, underneath the winchman.

Q. Are you sure of that, Mr. Young?

The COURT.—Can you visualize it?

A. As a practical man, I can't visualize how else—

Q. Do you feel as positive of that as anything else you have said in your testimony?

(Testimony of John G. Young.)

Mr. WICKERSHAM.—Oh, I object to that.

The COURT.—Objection sustained.

Q. Do you feel that you might be mistaken about that, Mr. Young?

A. I might be mistaken with reference to the position of the winch-driver on the deck; yes.

Q. Yes.

A. Because as a practical man, I can't see why he should be standing aft of the hatch with all his gear running forward. He has got to lead through too many blocks to operate successfully.

Q. And might you not be mistaken about the gear on the ship and the falls and all that as to the position that you have embodied in your answer? [102]

A. What do you mean? About the forward booms?

Q. Yes. Might you not be mistaken about the relative position on the boom?

A. Mistaken about the forward booms being used?

Q. As to their relative position to the hold. Don't you know what the word "relative position" means? A. I expect so.

Q. I asked you a very simple question. I asked you whether or not you might not be mistaken as to the relative position of the forward booms relative to this hold in which the men were unloading coal out of?

A. The forward boom was forward of the hatch or aft of the hatch, is that what you mean to ask me?

(Testimony of John G. Young.)

Q. Yes.

A. The forward boom must be forward of the hatch, or it wouldn't be the forward boom.

Q. It must be forward of the hatch? A. Yes.

Q. You don't think there is any possibility that you are mistaken about the relative position of the boom?

A. That is, one end of the boom is on the forward mast and the other is hanging on the forward mast.

Q. And you feel confident that the winchman was using that fall from off that boom, do you—that he was using the tackle from off that boom—do you, or don't you, feel confident of that?

A. You put it in such a way that a man can't believe his eyes.

Mr. WICKERSHAM.—Well, just answer the question. If you are not sure, tell him so; if you are not confident of it, say so. [103]

A. As a practical man, I can't see how he could run the—

The COURT.—Well, the question is— Repeat the question.

(Question repeated by reporter.)

The COURT.—That means if the winchman was using the fall off the boom attached to the forward mast.

The WITNESS.—Oh, there is no question at all that the buckets were being hoisted out of the hold with the gear hanging from the forward mast.

Q. Is there two boom-sticks there—boom No. 1 for hatch No. 1 and boom No. 2 for hatch No. 2?

(Testimony of John G. Young.)

A. I expect the boat carries four booms.

Q. Is that true what I asked you? I didn't ask you to ask me a question.

A. We have two booms on the forward mast.

Q. You have two booms on the forward mast?

A. Yes.

Q. Which one is used for No. 2 hold?

A. I expect you have to use both of them.

Q. You used No. 2 boom on No. 2 hold?

A. It's hardly fair to ask me whether we used No. 2 boom on No. 2 hold. I don't know how they number those hatches on ships.

Q. I told you in the first place, Mr. Young, that I was assuming that the hatch practically amidships is No. 2 hatch and I have been asking all my questions on that assumption. A. Yes.

Q. And you heard me say it.

Mr. WICKERSHAM.—I object to counsel's quarreling with the witness.

The COURT.—I think so, too. You asked one question as to [104] the assumption of the main hatch in the center of the boat being No. 2 hatch, but you never carried that assumption through the remainder of your questions.

Q. All right, if the Court please; then all the questions I asked are to the effect that No. 2 hatch is the hatch that is practically in the center or amidships. On that assumption, you still want to make your contention relative to, as regards the relative position of where the winchman stood that night when you were working on that cargo?

(Testimony of John G. Young.)

A. Well, can I ask a question?

Q. Yes, sir.

A. What is the number of the hatch that we're working on?

Q. No. 2 hatch.

A. We're now working on No. 2 hatch?

Q. Yes, sir; that's it. A. No. 2 hatch.

Q. Yes, sir.

A. We were unloading No. 2 hatch with the hanging gear from the forward mast. It was the booms hanging from the forward mast that were unloading that hatch No. 2.

Q. And that forward boom was forward of No. 2 hatch, is that correct? A. Yes, surely.

Q. And the winchman stood forward of No. 2 hatch. Is that correct?

A. Well, I claim that is the practical position for him to be in.

Mr. WICKERSHAM.—Well, I ask the Court to instruct him that if he knows— [105]

The COURT.—He has already answered it two or three times that he wasn't confident.

Mr. WICKERSHAM.—Well, then, I object to any further question on the subject.

The COURT.—Objection sustained.

Mr. ROBERTSON.—The reason I asked him that, your Honor, is this: As I understood, Mr. Young—Im not trying to do him an injustice or to trap him—he placed one of the clusters of light relative to where the winchman stood. Now, I am trying to get the winchman definitely located, so I

(Testimony of John G. Young.)

can also ascertain where the cluster of lights was. He told us that there was a cluster of lights, as I understood him to say, just below the winchman. I am trying to find out where it is he claims that the winchman was so that I can know where the lights were.

A. I described the cluster as hanging from the midships stanchions, didn't I?

Q. And also relative to the winchman.

A. Should be under his feet.

Q. Right under his feet? A. Yes.

Q. Then whereabouts on the midship stanchions would they be to the forward or the rear part of the hold?

The COURT.—Midship stanchions or stanchions running in the middle of the boat, running sideways, running right through the center of the boat?

A. Yes, from stem to stern.

Q. Yes, but I say, with reference to the forward or rear of the hold? [106]

A. With reference to the forward coaming of the hatch, there (indicating).

Q. That is to say, you mean right about there (indicating)? A. Right about there; yes.

Q. On the midship stanchions; on the forward coaming of the hatch, is that what you mean?

A. That is what I was trying to convey.

Q. Yes. And you claim that the winchman was standing just above the cluster of lights, is that it?

A. I believe he was.

Q. Were there any clusters of lights also hanging

(Testimony of John G. Young.)

on the coaming of the hatch, on the rear, or back coaming of the hatch?

A. I described that one also.

Q. There was also one there?

A. I described one there, hanging—it would be down in the corner, and I should judge, on the bottom part of it. Just about in there; yes.

Q. On the starboard side?

A. Starboard after quarter of the hatch coaming.

Q. Those clusters of lights didn't illuminate the place where the longshoremen were working, did they?

A. I presume they did, or they would have shifted them so that they would.

Q. It is possible to shift them forward?

A. Yes; they are not fixtures; they're simply extensions with reflectors about the same as a wash basin, with lamps stuck in them.

Q. With reflectors in the back?

A. Reflectors in the back of about the size and shape of a wash basin; yes, sir. [107]

Mr. ROBERTSON.—I think that's all.

Testimony of Frank Alfred Williams, for Plaintiff.

FRANK ALFRED WILLIAMS, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name.

(Testimony of Frank Alfred Williams.)

A. Frank Alfred Williams.

Q. How old are you, Frank?

A. Twenty-six, going on twenty-seven.

Q. What is your business?

A. Well, I have no particular business.

Q. Have you ever worked at longshoring?

A. Yes, sir.

Q. How much have you worked at longshoring?

A. Well, not very much.

Q. Did you do any work about the eighth or ninth day of March last, a year ago, in 1922?

A. Yes, sir.

Q. Where? A. On the dock.

Q. On the "Latouche"?

A. On board— Yes, sir.

Q. When did you begin to work on the "Latouche"? A. Midnight; after midnight.

Q. At one o'clock? A. Yes, sir.

Q. What day was that? Was it the night of the eighth?

A. I can't remember what date of the month it was. [108]

Q. Who worked with you?

A. Well, there was two other fellows with me.

Q. Who were they?

A. I don't know the young fellow's name, but one of the fellows that got hurt, I know his name.

Q. Is that he, sitting over here (pointing)?

A. Yes, sir.

Q. Barney McHugh? A. Yes, sir.

Q. You were working with him? A. Yes.

(Testimony of Frank Alfred Williams.)

Q. At what time did you begin to work?

A. At midnight.

Q. One o'clock? A. One o'clock.

Q. At night? A. Yes, sir.

Q. Was he hurt that night? A. Yes, sir.

Q. How long after you began to work with him was he hurt? A. I can't say just how long.

Q. Well, about how long? A few minutes don't make any difference.

A. Oh, it wasn't very long after we started to work.

Q. Half an hour or so?

A. No; I can't say it was a half an hour.

Q. How was he hurt?

A. Well, the bail of the bucket he was using fell on his foot. I don't know which side of the foot it was. Across here (indicating). [109]

Q. What were you doing just at that time, Frank?

A. I was on one side of the bucket, pushing on it.

Q. Where was he?

A. He was on the back end of it, pulling it.

Q. He was pulling it? A. Yes, sir.

Q. What fell on him? A. The bail.

Q. What caused it to fall?

A. I don't know just what caused, but my idea was—

Mr. ZIEGLER.—Just a moment. We object to what his idea of it is.

Q. Just tell what you saw, what happened there.

A. Well, I was pushing on it, me and the young

(Testimony of Frank Alfred Williams.)

fellow was pushing on it, on the bucket—he was on one side and I was on the other—and Barney was pulling on the bucket, and the jar knocked— It was a kind of a rough place where we handled this bucket, and the jarring of it, I guess, loosened the bail of the bucket and it fell on his foot.

Q. What did he do after the bail fell on his foot?

A. He just naturally sat down. He couldn't move—I guess it hurt him so much—and we went over to see what happened, and he said the handle come down on his foot.

Q. What became of him? A. He left.

Q. Where did he go?

A. On the top deck somewhere.

Q. Who helped him up, if anybody?

A. Well, "anybody," myself and I forget who the other fellow was, [110] helped him up on deck.

Q. Did anybody come after that time to take Barney's place? A. Yes, sir.

Q. Who came?

A. There was another fellow. They call him Captain Gillis. I don't know—

Q. (Interrupting.) Call him what?

A. Call him Captain Gillis. I don't know what his right name is.

Q. Do you see him in the courtroom?

A. Yes, sir.

Q. Where is he?

A. The second man up there (indicating).

Q. Is that the man (pointing)? A. Yes, sir.

(Testimony of Frank Alfred Williams.)

Q. How long after Barney was hurt did he come there?

A. I don't know just how long it was.

Q. Frank, tell the jury what there was about this bucket to handle it with. Were there any ropes around it or anything to pull it or push it with?

Mr. ROBERTSON.—Now, if the Court please, we object to that as too leading.

Mr. ZIEGLER.—Let him describe the bucket.

Mr. WICKERSHAM.—Well, I am asking him to describe the bucket.

The COURT.—Yes; he can state. He asked generally.

Mr. WICKERSHAM.—Yes.

The COURT.—Was there anything on the bucket to handle it with?

A. Nothing that I know of.

Q. Was there any rope attachment to pull it by?
[111]

A. No, there was no rope; never noticed any rope.

Q. How did you handle it? Just tell the jury how you did handle the bucket.

A. Well, the way we handled the bucket—here (indicating) is the bucket; one man on that side and another man on that side. We shoved, we pushed on it.

Q. Yes.

A. Barney in front, pulling on the bucket and there is a bail right here (indicating); not exactly in the center, but towards the back part of it. Now,

(Testimony of Frank Alfred Williams.)

this is the position we was in when Barney got hurt. I was pushing on it and the other young fellow—

Q. (Interrupting.) You were pushing on the side of the bucket. Just show the jury what you were pushing on.

A. He was on this side; I was here (showing); the other fellow on the other side, and Barney was on this side (showing).

Q. Pulling? A. Yes, sir.

Q. Whereabouts did you have hold of the bucket?

A. Right here (indicating); about in there and here.

Q. On the top of the bucket? A. Yes, sir.

Q. How far did you have to push the bucket?

A. About twelve or fifteen feet under the hatch.

Q. How far had you gone from the coaming before the bucket, before the fail fell?

A. About half way.

Q. How long was that bucket used after Barney was hurt? A. You mean, how long we used it?

Q. Yes. [112]

A. I don't know just how long after—

Mr. ROBERTSON. (Interrupting.) We object to that as incompetent, irrelevant and immaterial. That's after the accident as I understand it, isn't it? Is that what you mean, after the accident?

Mr. WICKERSHAM.—Yes.

Mr. ROBERTSON.—Well, we object to it as not part of this case—what took place after the accident happened.

(Testimony of Frank Alfred Williams.)

The COURT.—Well, I'll hear from you on that. I think—

Mr. WICKERSHAM. (Interrupting.) I want to show simply that the bucket was laid aside.

The COURT.—I'll hear from Mr. Robertson on his objection to that. If it can be shown that laying it aside after the accident is not material, I would like to know it.

Mr. ROBERTSON.—Well, it seems to us that what happened to the bucket after the accident is immaterial. The question, as I understand is as to the condition of the bucket at the time of the accident, or preceding the accident; not afterward.

Q. Was there any change made in the bucket after Barney was hurt?

Mr. ROBERTSON.—The same objection.

The COURT.—Objection overruled.

Mr. ROBERTSON.—We take an exception.

Q. By anybody?

A. Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets. [113]

Q. Do you know whether that bucket dumped itself when it was being taken out at any time?

Mr. ROBERTSON.—I object to that as leading, if the Court please.

Mr. WICKERSHAM.—I asked him if he knows anything about it.

(Testimony of Frank Alfred Williams.)

The COURT.—Objection overruled.

Do you know whether or not—

A. I don't remember. I can't say, because I was underneath the hatch. I can't see on deck of the hatch.

Q. Do you know whether there was anything, any block of wood put in between the handle and the bucket to hold it at any time that night?

Mr. ROBERTSON.—The same objection.

A. I never noticed.

Q. You didn't notice that? A. No.

Q. Did you notice whether or not the tripper was broken in any way?

Mr. ROBERTSON.—I object to that as leading, if the Court please.

Mr. WICKERSHAM.—I asked him if he knows it.

Mr. ROBERTSON.—Why don't you ask him the condition of the bucket?

Mr. WICKERSHAM.—Well, I'll ask him the condition of the tripper then, whether it was broken or in good shape.

Mr. ROBERTSON.—Object to that as leading.

The COURT.—Objection overruled.

A. I never noticed any.

Q. You never noticed? [114] A. No.

Q. Did the handle fall more than once that night, Frank? A. No.

Q. You don't remember it falling but once?

A. I don't remember, unless we laid it down ourselves to get it out of the way.

(Testimony of Frank Alfred Williams.)

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Barney McHugh and yourself and one other young fellow, you worked on one bucket, is that what I understood you to say? A. Yes.

Q. The other young fellow, is he an Indian?

A. No, sir.

Q. What is he? A. I don't know what he is.

Q. White man?

A. He is a white man, I know.

Q. You don't know his name, though?

A. No, I don't know his name.

Q. How long did you three men work together?

A. I can't say just how long.

Q. What time did you first go to work unloading coal off the "Latouche" that time?

A. Midnight; one o'clock.

Q. You just came off to get your supper, is that it, and went back to work at midnight?

A. No; I went to work at midnight; one o'clock.

Q. Had you worked any before midnight? [115]

A. Not on that boat.

Q. You hadn't worked on that boat at all unloading coal before midnight?

A. Not before midnight.

Q. New crew went on at that time, is that right?

A. Yes, sir.

Q. Now, I understood you to say, Frank, that at that time you were pushing on the bail on one side of the bucket?

(Testimony of Frank Alfred Williams.)

A. I wasn't pushing on the bail; I was pushing on the bucket.

Q. Pushing—

A. (Interrupting.) On the bucket; not the bail.

Q. Pushing on the bucket?

A. Not on the bail.

Q. On the rim of the bucket?

A. On the rim; yes, sir.

Q. On the rim of the bucket, toward the lip of the bucket, the front part of it?

A. Pushing the other way; back part of it.

Q. You were pushing on the bucket. What part of the bucket do you call this—the nose?

A. I don't know what you call it.

Q. Or the lip?

A. Nose or the lip; I don't know.

Q. The bucket has got a kind of a lip on it like that, hasn't it? A. Yes.

Q. You were pushing, you three men. You were on this side pushing the bucket so that this part of it goes that way, or which way? [116]

A. No; not three men pushing. Two men were pushing, one was pulling.

Q. Who was the man pulling? A. Barney.

Q. Where was Barney pulling?

A. On that end (showing).

Q. Barney up here (indicating)? A. Yes, sir.

Q. What did Barney have hold of, the rim?

A. Yes, sir.

Q. Pulling the same way that you did?

A. Yes, sir.

(Testimony of Frank Alfred Williams.)

Q. Is that right? A. Yes, sir.

Q. Could the bail of the bucket fall that way toward the lip? A. No, I don't think so.

Q. It could just fall one way, toward this way (indicating)? A. Yes.

Q. Had the bucket just come down from unloading some coal when the accident happened?

A. Yes, sir.

Q. You went on the one o'clock shift, I understood you to say? A. Yes.

Q. And you loaded the bucket with coal and worked there for a while, sent out the buckets of coal, I mean, to have them unloaded?

A. Yes, sir.

Q. And the bucket had gone up and come back empty and you three men were taking it back again to load it up when the accident happened, is that right? A. Yes, sir. [117]

Q. Now, you said that you were back in the hold about how many feet under the edge of the coaming? A. You mean how far back we worked?

Q. Yes.

A. Between twelve and fifteen feet.

Q. You say that you got the bucket about half the distance in when the accident happened, is that correct? A. Yes, sir.

Q. After you loaded the bucket, did you generally turn it around after you got it loaded, or while still empty? A. While still empty.

Q. You turned it around while still empty?

A. Yes, sir.

(Testimony of Frank Alfred Williams.)

Q. And after it would get loaded—you would turn it around then get it loaded, then they pulled it out by hooking the hook on the bail, and then pull it out this way, isn't that what they did? A. Yes.

Q. And you remember those two ropes, Frank, one on each side near the lip up here, one on each side? A. No.

Q. You don't think there were any ropes there?

A. I don't remember any ropes.

Q. Have you ever worked at discharging coal before, as a longshoreman? A. Yes, sir.

Q. The same boat? A. No.

Q. Never worked on her before?

A. No, sir. [118]

Q. Frank, which side of the boat did the young fellow and Barney McHugh work on?

A. On the outside.

Q. What side?

A. I don't know what side it was—starboard or port.

Q. Left-hand side? You know which is your right and which your left hand?

A. Here is my left and here is my right (showing).

Q. Well, you worked on the left side of the boat, looking forward?

A. Worked on the right-hand side looking forward.

Q. You worked on the right-hand side looking forward? A. Yes, sir.

Q. You worked there all the time, you think,

(Testimony of Frank Alfred Williams.)

on the right side looking forward, during this evening, from after one o'clock?

A. We didn't work there all the time. We worked there that night.

Q. You used the same bucket all the time?

A. Yes, sir.

Q. How many other men were working in the hold together?

A. Well, there was eight men besides myself.

Q. Nine men altogether up to the time Barney got hurt, is that right? A. Yes, sir.

Q. Three men on each bucket? A. Yes, sir.

Q. And you kept one on the port side of the ship, another bucket amidships and another bucket on the other side of the ship, is that right?

A. Yes, sir. [119]

Q. Do you know how many buckets you would take out in an hour, Frank?

A. Never kept track of it.

Q. Would you take out more than one an hour?

A. Take out maybe a dozen; I don't know. I never kept track of it.

Q. Well, you think you may have taken out as many as a dozen an hour?

A. Maybe; maybe more.

Q. I mean your own bucket. You loaded your bucket and sent it up and reloaded it, you think, maybe a dozen times an hour, is that right?

A. No; not one bucket.

Q. How many times with your bucket?

A. I can't say just how many times.

(Testimony of Frank Alfred Williams.)

Q. You think as many as six times?

A. I don't know; I can't say. Might be one; might be six; might be a dozen. I don't know how many times it goes up.

Q. You think it would be less than five?

A. I can't say.

Q. That is the best you can say—maybe six, maybe a dozen, do I understand you correctly?

A. Maybe once.

Q. You think maybe only once?

A. I don't know; I can't say just how many.

Q. You mean to say it took—

Mr. WICKERSHAM.—(Interrupting.) I object, may it please the Court.

The COURT.—Objection sustained.

Mr. ROBERTSON.—I'll take an exception to the Court's ruling. [120]

Q. Now, Frank, how many buckets had you taken out before McHugh got hurt?

A. I never counted the buckets when they went up.

Q. Take out more than one? A. Yes.

Q. Take out more than two? A. Yes, sir.

Q. Take out more than three? A. Yes, sir.

Q. Take out more than four? A. Yes, sir.

Q. Take out more than five?

A. I don't know whether we did or not.

Q. You don't know that? A. No.

Mr. ROBERTSON.—I think that's all.

Redirect Examination.

(By Mr. WICKERSHAM.)

Q. Did you use the same bucket all the time?

(Testimony of Harry Gillis.)

A. Yes, sir.

Mr. WICKERSHAM.—That's all.

Testimony of Harry Gillis, for Plaintiff.

HARRY GILLIS, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name.

A. My name is Harry Gillis.

Q. How old are you? [121]

A. Oh, 34, going on 35.

Q. Where do you reside? A. Ketchikan.

Q. How long have you lived here?

A. I came up here in 1912.

Q. What is your business?

A. Oh, longshoring right at the present time—
fireman by trade.

Q. How long have you been working in that business? A. Firing or longshoring?

A. Longshoring. Excuse me.

A. Oh, off and on for the last five years.

Q. Were you engaged in that kind of work in March, 1922, of a year ago? A. Yes, sir.

Q. What boat did you work on at that time?

A. Oh, the "Latouche," I think it was.

Q. The "Latouche." Did you work on the "Latouche" on the night of March 8 and the morning of the ninth? A. Yes, sir.

(Testimony of Harry Gillis.)

Q. What time did you go to work?

A. Oh, somewheres between one and two o'clock.

Q. Who was engaged in working with you, if anybody? A. Frank.

Q. Frank Williams? A. Yes, sir.

Q. The man who was just on the witness-stand?

A. Yes, sir.

Q. About what time did you go to work?

A. Oh, it was about one-thirty. [122]

Q. About one-thirty?

A. To be exact. Somewheres around there.

Q. What were you doing. A. Shoveling coal.

Q. What were you loading into? A. Buckets.

Q. A bucket. A. Yes, sir.

Q. What kind of bucket? A. Iron.

Q. Iron bucket? A. Or steel.

Q. Stand up and show the Court and jury about how high that bucket is or was.

A. Oh, about so (indicating).

Q. And about how large otherwise? How wide was it?

A. Oh, about so wide (indicating).

Q. And about how long?

A. About so long (indicating).

Q. Like this illustration on the blackboard?

A. That would be backwards.

Q. That would be backwards? A. Yes.

Q. Why do you say that would be backwards?

A. This thing here (showing) is on the wrong side.

Q. You mean this tripper is on the wrong side?

(Testimony of Harry Gillis.)

A. Yes.

Q. That is on the other side of the bucket?

A. Yes.

Q. Otherwise is it all right? [123] A. No.

Q. What else is the matter with it?

A. This thing (indicating) wasn't on it at all.

Q. Wasn't on the bucket that you worked with?

A. No.

Q. What had become of it?

A. I don't know, I am sure. Broken off, I suppose.

Q. There was no clutch, was there?

A. This thing is here (indicating), but this thing is gone here.

Q. You mean this handle was gone? A. Yes, sir.

Q. What was the effect of the breaking of that?

A. I am not sure.

Q. Do you know what shape the bucket was in that night, that bucket?

A. Well, it was a hay-wire rig.

Q. A hay-wire rig? A. Yes.

Q. What was there broken about it?

A. How is that?

Q. What was there broken about it—just that handle? A. Yes, sir.

Q. Do you know whether the tripper itself had tripped off?

A. Sure; tripped itself; sure.

Q. While you were there at work?

A. Yes, sir; yes, sir.

Q. Did you see it?

(Testimony of Harry Gillis.)

A. Sure; come pretty near spilling a lot of coal on me.

Q. How many wheels, if any, were there under that bucket? [124] A. Three, is all.

Q. How long did you work with it? A. Oh—

Mr. ROBERTSON. (Interrupting.) We object to that as incompetent, irrelevant and immaterial. This is all after the accident?

Mr. WICKERSHAM.—Yes, sir; immediately after the accident.

The COURT.—Objection overruled.

A. It wasn't over two hours at the most.

Q. Then what was done with the bucket?

A. We pushed it to one side.

Q. Did it trip while you were working with it?

A. Yes, sir.

Q. Just explain to the jury how that happened and how soon after you went to work.

Mr. ROBERTSON.—I object to that for the same reason—too remote.

The COURT.—Objection overruled.

Q. How long after you went to work did that happen?

A. The first time it happened was about half an hour after.

Q. What happened at that time?

A. Why, it spilled all the coal out of it.

Q. Where was it when it spilled the coal?

A. In the center of the hatch.

Q. How far up?

A. Oh, it didn't get off the ground at all.

(Testimony of Harry Gillis.)

Q. Well, was the wire cable attached to it when it spilled? A. Yes, sir.

Q. Was anybody touching it? [125] A. No, sir.

Q. What made it trip itself off, do you know?

A. Why, the catch.

Q. What was the matter with the catch?

A. Wore out is all.

Q. Did it do that again any other time that evening?

Mr. ROBERTSON.—The same objection.

A. Yes, sir.

Q. How soon? A. Oh, I can't swear.

The COURT.—Objection overruled.

Q. Well, within that two hours? A. Yes, sir.

Q. What did it do then?

A. It fell back and hit another man's foot.

Q. Who was he? Was he working with the bucket?

A. I don't know; I don't remember exactly who it was. Yes, sir.

Q. Where was he standing when he was struck?

A. Why, he was taking the bucket back to the coal pile.

Q. Why did the handle fall that time?

A. Oh, it come unhooked.

Mr. ROBERTSON.—The same objection.

The COURT.—Objection overruled.

Q. Did you examine that bucket carefully?

A. Sure.

Q. How long have you worked with buckets of that kind in unloading coal?

(Testimony of Harry Gillis.)

A. Oh, off and on for the last four or five years.

Q. Have you worked with many buckets like that?

A. Yes, sir; a lot of them. No; no, beg pardon. Wait. That [126] is my first experience with anything like that thing there.

Q. Have you worked with buckets of this type in good order?

A. Yes, sir; lots of them.

Q. Was that bucket in good order that night?

A. It wasn't; no, sir.

Q. Did you examine it carefully? A. Sure.

Q. You may state to the jury whether or not, in your judgment, it was a safe appliance, safe appliance to be used for that purpose that night?

A. It wasn't; no; no.

Mr. ROBERTSON.—Now, we object to that as incompetent, irrelevant and immaterial.

A. It wasn't.

Mr. ROBERTSON.—No proper foundation laid to qualify him.

The COURT.—Objection overruled.

Q. What did you do after the bucket was laid aside?

A. Shoveled coal. I shoveled coal into one of the other buckets.

Q. The men were divided up? A. Yes, sir.

Q. Did any of the men quit? A. No.

Q. They were divided up into two groups?

A. Yes, sir.

Q. Mr. Gillis, I wish you would tell the jury what

(Testimony of Harry Gillis.)

is the usual method that longshoremen handling coal in buckets as you were that night, follow in pulling a bucket back when it comes down to be loaded. Is there any particular way of doing it? [127]

Mr. ROBERTSON.—Now, wait. I object to that, if the Court please—

A. Yes, sir.

Mr. ROBERTSON. (Continuing.) On the ground that it is incompetent, irrelevant and immaterial. The usual way or custom among longshoremen wouldn't be sufficient to bind the defendant in this case if the way they used was in fact negligent.

The COURT.—Objection overruled.

Q. Just state if there is any usual custom; or how do you do it when the bucket comes down? What do you do with it?

A. There is generally a couple of lugs fastened on it.

Q. Where are they fastened on it?

A. Up at the lip.

Q. Were there any on this bucket?

A. Absolutely not; no, sir.

Q. Was there anything on this bucket to pull it with? A. No, sir; no, sir.

Q. Well, what do you do when a bucket comes down and you want to get it back to the coal pile?

A. Push it back.

Q. Push it back? A. Yes, sir.

(Testimony of Harry Gillis.)

Q. Does it make any difference whether you push this end forward or that end (showing)?

A. It don't make any difference on a good bucket; no.

Q. Were there any rollers under this bucket?

A. Yes, sir.

Q. Are the rollers put on there so that you can push it either [128] forward or backward?

A. Yes, sir.

Q. But not sidewise? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. If the bucket is in good order and this safety clutch is in good order, will the handle stand up whether you push it forward or backward?

A. Sure.

Q. Well, I ask you if it is just as safe one way or— A. (Interrupting.) Yes, sir.

Q. So that if the safety clutch is in order—

A. (Interrupting.) Yes, sir; turn it upside down and you can't unhook it.

Q. If the safety clutch is in shape?

A. Yes, sir.

Q. Was that safety clutch in good order that night? A. No, sir.

Q. Was that why it fell?

Mr. ROBERTSON.—Oh, I object to that as leading.

The COURT.—Objection sustained.

Mr. ROBERTSON.—He has led the witness all the way through. Witness is entirely—

(Testimony of Harry Gillis.)

The COURT.—Strike out the last answer and question.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.) [129]

Q. Even on this tub that you are speaking of the bail couldn't fall toward the lip, forward toward the lip, could it? A. No, sir.

Q. The only way the bail could fall would be towards the rear of the tub, is that not correct?

A. Yes, sir.

Q. Now, on this tub, with this portion, the handle part of the tripper gone, how was the tub dumped? How did you dump the tub?

A. I don't know how they dumped it up there.

Q. You don't know?

A. Because I wasn't up on the hopper.

Q. Well, now, when it came back to you down in the hold, after it had been unloaded and came back down, you and the two men who were working with you would run it back up to the coal pile and load it up again, would you not? A. Yes, sir.

Q. Would you turn it around before you loaded it or after you loaded it?

A. Before we loaded it, of course.

Q. Well, now, when you turned it around, then did you take the bail down? A. Yes, sir.

Q. How did you unfasten the bail then so as to get the bail down? A. Just lift it up.

(Testimony of Harry Gillis.)

Q. You lifted it up? A. Yes, sir.

Q. This little thing that went over the catch?

[130] A. Yes, sir.

Q. The sort of trigger that went over the hatch?

A. Yes, sir; that's all there was to it.

Q. Is that the only way it could be lifted up?

A. Sure.

Q. The only way the bail could be made to come down? A. Yes, sir.

Q. When it went up loaded, was there anything put on that so that the man on the hopper could unload it in any other way? A. No, sir.

Q. That is the way it went up? A. Yes, sir.

Q. Now, then, did you look at the other two tubs there? A. Yes, sir.

Q. Were you working down there in the hold that night? A. Yes, sir.

Q. And the other two tubs had lugs on the lip?

A. What is that?

Q. The other two tubs had lugs on the lip?

A. Yes, sir.

Q. But this tub didn't? A. Yes, sir.

Q. You are quite sure of that?

A. Quite sure; yes, sir.

Q. And this one out of the three didn't have them? A. Yes, sir.

Q. And you continued to use the tub there for something like two hours, is that correct?

A. Oh, it might not have been over an hour and a half. [131]

Q. Well, I just wanted to know about the time?

(Testimony of Harry Gillis.)

A. Yes, sir.

Q. How many tubs of coal during that time did you send up—how many loads?

A. I can't swear to that.

Q. Well, you have had considerable experience as a longshoreman? A. Yes, sir.

Q. Discharging coal, shoveling coal into tubs and all that, haven't you? A. Yes, sir.

Q. About how many tubs do you average an hour, a crew of three men?

A. Oh, the best we can do is about six an hour.

Q. About six an hour? A. That is the best.

Q. Is that about what you were averaging that time? A. I think so.

Q. What wings of the ship were you working in?

A. I was working on the far side.

Q. You were working on the far side?

A. Yes, sir.

Q. On the port or starboard wing?

A. Starboard, I think it was.

Q. Your recollection is that you were working on the starboard wing?

A. I think so, if I am not mistaken.

Q. Well, starboard is on the right-hand side, looking forward, isn't that right?

A. That is right. [132]

Q. Wasn't it on the port side, left-hand side, looking forward? A. No; absolutely not; no sir.

Q. You are sure it wasn't on the port side, but was on the starboard side?

A. Yes, sir; positively sure.

(Testimony of Harry Gillis.)

Q. Pardon me? A. Positively sure it was.

Q. When you went on shift at about, I think you said you went on shift somewheres between one and two o'clock? A. Yes.

Q. That would be in the early morning?

A. Yes, sir.

Q. You hadn't been on the shift, working on the ship prior to that time?

A. Absolutely not. I finished her up, though.

Q. How is that? A. No, but I finished her up.

Q. You worked the following day until that noon, when you discharged the entire cargo?

A. Yes, sir.

Q. I understood you to say, Mr. Gillis, that you called this a hay-wire contrivance. Is that what you call it? A. Hay-wire rig; sure.

Q. Pardon me. A. Sure.

Q. What do you mean by that?

A. Why, it didn't work right.

Q. You mean there was some hay-wire on it?

A. No. [133]

Q. Oh, that is just to describe it? A. Yes, sir.

Q. Due to the fact that you claim that this part of the tripper that is, the handle of the tripper, was off? A. Yes, sir.

Q. That is what you mean by "hay-wire" contrivance? A. Yes, sir.

Q. There was no hay-wire on it, though?

A. Absolutely not; no, sir.

Q. Mr. Gillis, when the tub is loaded with coal

(Testimony of Harry Gillis.)

and suspended on the hook from the tackle and all that— A. Uh-huh.

Q. (Continuing.) Do you know whether or not that throws a strain on this little latch so as to hold it down over the catch? A. I don't know.

Q. You don't know about that? A. I don't.

Q. What was it held it up in place, Mr. Gillis?

A. Held what up in place?

Q. That held the bail in place, going up on those various loads that they did carry the coal up?

A. Why, the catch, of course.

Q. The catch held it? A. Yes, sure.

Q. The catch held it? A. Sure; grabbed it.

Mr. ROBERTSON.—That's all.

Redirect Examination.

(By Mr. WICKERSHAM.) [134]

Q. Did I ask you if there was any becket or rope attached to this to pull it by?

The COURT.—Yes.

A. No.

Q. Oh, you answered that. Was there any iron hand-hold on the side of it to pull it back?

A. No, sir.

Q. What is it? A. Not to my knowledge; no.

Recross-examination.

(By Mr. ROBERTSON.)

Q. You don't recall that, Mr. Gillis?

A. No, sir.

Mr. ROBERTSON.—That's all.

Testimony of Alvin Soderberg, for Plaintiff.

ALVIN SODERBERG, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. What is your name? A. Alvin Soderberg.

Q. Mr. Soderberg, how old are you?

A. Thirty-one.

Q. How long have you resided in Alaska?

A. Off and on since 1912.

Q. What is your business or occupation?

A. Well, follow almost anything; usually fishing.

Q. Where were you working in March, a year ago? [135]

A. Well, I was employed off and on on the docks down here.

Q. What were you working at there?

A. Longshoring.

Q. Do you remember having worked on the "La-touche" at any time? A. Yes, sir.

Q. Do you remember who was working there with you at any time?

A. No; they were all strange people to me.

Q. What?

A. They were all strange people to me.

Q. Did you ever work there with Barney?

A. I seen Barney work there; yes.

Q. Where did you work?

(Testimony of Alvin Soderberg.)

A. I worked down in the hold.

Q. What were you doing on the "Latouche"?

A. Shoveling coal.

Q. Were you working there on the night, about March eighth or ninth? A. Yes.

Q. Do you remember that any one was hurt there that night? A. Yes, I do.

Q. Who was hurt? A. Barney McHugh.

Q. Were you present when he was hurt?

A. Yes, sir.

Q. Just tell what, if anything, you saw of that matter?

A. Well, I *seem* the bail come down. They was pushing it back into the hatch coaming and it fell on a part of his leg.

Q. What happened when he was hurt?

A. Well, he groaned and hollered and sat down and after a while, somebody helped him up. [136]

Q. What became of him?

A. Well, I don't know. I guess they took him to the hospital, or something.

Q. Did you examine the bucket that he was working with that night?

A. I seen it, took a look at it first when I came down into the hold.

Q. What time did you first come down there?

A. One o'clock.

Q. How long after you came down there before Barney was hurt?

A. Oh, I suppose it was, oh, half an hour—little more probably.

(Testimony of Alvin Soderberg.)

Q. About half an hour. You say you examined the bucket?

A. Well, I didn't make much of an examination, but I took a look at it.

Q. Just tell the jury what was wrong with the bucket, if anything.

A. Yes. It was an old, worn-out bucket. You could see it was no good, and I told the fellow that I was working with, "You better get away from that. It doesn't look good to me," because I had been handling quite a few buckets.

Q. Where was it broken, if at all?

A. Well, it was the lever part.

Q. Come right over to this illustration.

A. This here (indicating) was all bent out of shape in the first place and there was some attachment up here (including) missing. The lever here was all broken and bent out from the sides here. Instead of falling on the side, it was bent out and then there was some attachment up here missing. [137]

Q. What effect would that have upon the usefulness of the bucket?

A. The bucket wouldn't be safe. You couldn't depend on the becket. If that rig was in proper shape, the becket would hold it there. There was no chance so long as the becket was there, for it to trip.

Q. How long have you worked at the longshoring business?

(Testimony of Alvin Soderberg.)

A. Well, I never worked particularly as a long-shoreman, but I have been employed as a sailor.

Q. How long were you employed as a sailor?

A. Oh, I guess, probably I was in the service about nine months, for the Alaska Steamship Company.

Q. What boats did you work on?

A. I worked on the "Latouche," "Skagway" and on the "Alaska."

Q. Were you conversant with the character of these buckets on the "Latouche"? A. Yes, sir.

Q. And had you ever worked with that sort of buckets before? A. Yes, sir.

Q. How long have you been acquainted with that class of buckets?

A. Oh, different times, I was on the "Latouche" two or three months—four months, and on the "Skagway" three or four months.

Q. Now, from your examination of that bucket that night and from the actions that you saw it performing, was it or was it not a safe appliance for handling coal? A. It was not.

Q. And—

Mr. ROBERTSON.—I object to that. No proper foundation laid. [138] He hasn't been qualified as an expert, to answer that question.

The COURT.—I think you better question him further and see whether he is an A. B. seaman.

Q. How much work have you done around those buckets in the hold of vessels, in unloading coal?

(Testimony of Alvin Soderberg.)

A. Oh, I worked on them approximately six or seven months anyway.

Q. And was that six or seven months long enough to enable you to get acquainted with the mechanism of that bucket? A. Should be.

Q. Well, was it?

A. Well, yes; I should think it was.

Q. Were you or were you not acquainted with the mechanism of this bucket?

A. Sure, I was. At least, I thought I was.

Q. Well, then, I'll renew my question as to whether or not this bucket, that night, as it was being used by Barney and these other people at that time, was a safe appliance.

A. No, sir; it was not a safe appliance.

Mr. ROBERTSON.—The same objection.

The COURT.—Objection overruled.

Q. How many times, if more than once, did you see that fail fall?

A. Oh, I seen it fall—

Mr. ROBERTSON.—Wait a minute. I object to that, if the Court please, unless the time is fixed.

The COURT.—Yes.

Q. Well, that night, at or about the time Barney was hurt. [139]

A. I seen it fall three different times at least.

Q. Was any one else hurt with it?

A. There was another man hurt about half an hour later on, probably an hour and a half.

Q. How was he hurt?

(Testimony of Alvin Soderberg.)

Mr. ROBERTSON.—Now, I object to that, if the Court please.

The COURT.—Objection overruled.

Mr. ROBERTSON.—Incompetent, irrelevant and immaterial and not a part of the *res gestae* of this case.

Q. Go ahead.

A. He was hurt by the—

The COURT.—(Interrupting.) Now—

Q. How was he hurt?

A. The same way as Barney, only I think the bail took him farther up on the leg. They got this man out of the hold and I seen him a couple days after. He was limping around; and I have seen him since.

Mr. ROBERTSON.—I move to strike all that. That is no part of the answer.

The COURT.—All that latter part may be stricken.

Q. You say you have worked in taking out coal from boats of this kind? A. Yes, sir.

Q. Before? A. Yes, sir.

Q. How much experience have you had in taking the bucket down and placing it in a boat of that kind?

A. Oh, after you have been working, you have a little experience in taking them down. [140]

Q. Just tell the jury how you managed to get the bucket in place to fill with coal?

A. Well, the first thing we do— It depends on the condition of the coal and where you are work-

(Testimony of Alvin Soderberg.)

ing. If the bucket is loaded right down in the hold, you let the winchman drop it close to this and then you take the bucket and get it in position wherever you want it.

Q. Is there any rule or custom about which side of that bucket should go forward in pushing it back under the hatch? A. No; no.

Q. If it is pushed back with the back towards the coal, do you always turn it around?

Mr. ROBERTSON.—Well, now; I object to that as very leading.

Mr. WICKERSHAM.—That is exactly what I want to know.

The COURT.—You might change your question.

Q. Is there any rule about turning that around when you get back to the coal?

A. No; there is no such thing as a rule.

Q. But when you go to take it out from under the hatch, how do you get it out?

A. You have to lower the bail down and pull it out and when you get it into position, put the bail up again and hoist it out.

Q. What are these wheels on here for?

A. To shove it back there.

Q. Are those wheels so arranged that you can shove the bucket wither backwards or forwards?

A. Either way; yes.

Q. What was there on this bucket, if you know, to pull it by?

A. There was nothing on it to pull it by.

(Testimony of Alvin Soderberg.)

Q. Was there any rope or becket or anything attached to it to [141] pull it by? A. No.

Mr. ROBERTSON.—I object to that as leading.

The COURT.—Objection overruled. He has already answered.

Q. Well, what was there on that bucket to pull it by?

A. There was nothing on the bucket itself. You would have to get hold of the bucket the best way you could; but there was no rope attached to it.

Q. Were there any handholds on there?

A. No; the handles were not there.

Q. They were not there?

A. They were not there and I looked at it and I told the fellow that I was working with to get away from this. I says—

Mr. ROBERTSON.—(Interrupting.) Well, now, wait. I don't think that is a part of the answer—what he told somebody else.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Mr. Soderberg, what time did you go to work there that evening? A. One o'clock.

Q. Had you been working the previous evening?

A. No, sir.

Q. You went on shift at one o'clock in the morning? A. Yes, sir.

Q. And then you worked until the vessel was discharged about noon that day, is that correct?

A. Yes. [142]

(Testimony of Alvin Soderberg.)

Q. What other men were working on the same buckets that you were working on?

A. There was a man by the name, I think, of Swa—, if I ain't mistaken.

Q. Swa—?

A. I wouldn't say his name was so, but I think it was, so far as I can recollect, and the other fellow was a stranger completely to me. They were both strangers to me, so far as that goes.

Q. You were not working on the same bucket that McHugh was working on, is that correct?

A. No, sir.

Q. Which wing of the ship were you working in? A. I was on the port side of the ship.

Q. Which side? A. Port side.

Q. You were working on the port side?

A. Yes.

Q. You say you did go over and look at that bucket of McHugh's. When did you first go over to look at it?

A. I just took a look at it when I first came down the hold, the first time. There was no chance to look at it after that.

Q. When you first came down, it was one o'clock, is that what I understood you to say? A. Yes.

Q. And at that time, what was it you told that fellow?

A. I told this fellow that he better take another bucket. I said, "Better take another bucket. That bucket doesn't look good to me." [143]

Q. What fellows did you tell this to?

(Testimony of Alvin Soderberg.)

A. I told this fellow, I think his name is Swa—, but I don't know.

Q. Where were the other men then?

A. They were just coming down the hold then.

Q. They were all coming down the hold at that time? A. Yes.

Q. Did I understand you to say that the handle of the tripper was gone?

A. No; it was not gone completely.

Q. It was there, but bent out, is that it?

A. Bent out; yes. Well, a part of it was missing, up towards the catch.

Q. Up in here, you say? A. Yes.

Q. There was something gone? A. Yes.

Q. But this part (indicating) was there?

A. Yes.

Q. Is that what I understood you to say?

A. Yes.

Q. Now, when the bucket is loaded, Mr. Soderberg you pull it out ordinarily from underneath the coaming of the hatch by hitching it on to the tackle; that is you put a hook in here (indicating) that is on a cable and pull it out that way?

A. Yes.

Q. I mean, with the cable attached to the winch? A Yes. [144]

Q. Do you turn the bucket around before you do that? A. No.

Q. You mean that the cable— How is it pulled out, then?

A. You can pull it out with the bail down.

(Testimony of Alvin Soderberg.)

Q. That is, you lift the bail down this way (indicating)? A. Yes.

Q. And pull it out this way? A. Yes.

Q. Pull it out backward? A. Yes.

Q. Well, when you turn it around, how do you do it?

A. You have to turn it around when you do that.

Q. You have to turn it around to do that?

A. Yes.

Q. And you ordinarily do turn it around, so that it can be done, is that correct?

A. Why certainly.

Q. And this particular bucket, when you went over and looked at it as you were first down there, at that time were all three buckets down at the bottom of the hatch? A. Yes.

Q. And you went over and picked out the bucket that you and the two men you have mentioned were working with? A. Yes, sir.

Q. Is that it? A. Yes.

Q. And you picked out what you thought was a pretty good bucket and started to use it?

A. Certainly. [145]

Q. Did you ever again have occasion to use this other bucket that you are thinking about? A. No.

Q. How about the other bucket. You used one and there was *sti* a third bucket. Did you examine that bucket, too? A. How is that?

Q. I say, there was still a third bucket.

A. Yes.

Q. Did you examine that bucket, too? A. No.

(Testimony of Alvin Soderberg.)

Q. You didn't examine that?

A. I took a look—I might have taken a look at it.

Q. Just took a glance at it? A. Yes.

Q. And you picked out what you considered to be a good bucket and you took the two men with you and went ahead and went to work, is that it?

A. Sure.

Q. On this third bucket, did that have beackets and the handles on it? A. Yes.

Q. The third bucket you remember that had them on?

A. At least, I never saw anything wrong with the third bucket.

Q. You never saw anything wrong with it?

A. No.

Q. And the bucket that you used had beackets and handles on it? A. Yes.

Q. And the one that McHugh used, you don't recall whether or not that had beackets and handles on it? [146] A. It had beackets on; yes.

Q. It did.

A. But it did not have handles for pulling it.

Q. Had the beackets for what?

A. For moving it over.

Q. It didn't have this becket on it here (pointing)? A. Yes.

Q. The bucket that McHugh had had beackets attached to the trigger?

A. There was a piece of rope there anyhow.

Q. By becket you mean the piece of rope that is

(Testimony of Alvin Soderberg.)

attached to the end of the trigger and goes over a little projection that sticks out here (indicating); is that correct? A. Yes.

Q. That is the projection which, when the bail comes over or when the tub is dumped, goes up and strikes the bail, isn't that right? A. Yes.

Q. Sticks out there perhaps two or three inches? A. Yes.

Q. And you remember that that becket was on there? A. Yes.

Q. But you don't recall as to whether or not the becket was on up here (indicating). Is that right? A. No.

Q. And you don't also recall as to whether the handles was on up there, is that correct?

A. That is.

Q. Did you know Barney McHugh at that time?

A. No, sir. [147]

Q. Had you ever done longshoring with Barney before that? A. Never did.

Q. Was that the first occasion you had done any longshoring here in Ketchikan?

A. Yes; the first occasion.

Q. And prior to that where had you done longshoring? A. Well, fishing.

Q. Pardon me?

A. What did you say? I didn't hear you.

Q. Prior to that where had you done longshore work?

A. Well, off and on in the vessels; do all the longshoring work there is in the Alaska vessels.

(Testimony of Alvin Soderberg.)

The COURT.—You are a sailor, aren't you?

The WITNESS.—Yes, sir.

The COURT.—A. B.?

The WITNESS.—Yes, sir.

The COURT.—Able-bodied seaman.

The WITNESS.—Yes, sir.

Q. As I understand you, you have been on vessels in these waters? A. Yes, sir.

Q. Were you working for the Alaska Steamship Company? A. Yes; I have.

Q. They used coal buckets, self-dumping buckets, isn't that correct? A. Yes, sir.

Q. Now, then, when the bucket is loaded and being taken up through the air, Mr. Soderberg, and is suspended from the end of the cable that goes to the winch, does any strain come on the bail to cause it to press this sort of latch, or whatever you call it, down over that little catch? [148]

A. Yes; it puts some pressure on it there. I don't know just what you would call it; weight of it would press it down; that is, it fits in quite well.

Q. On this particular tub that Barney was working on, you never had occasion to unfasten the bail, did you? A. No.

Q. To trip the bail? A. No.

Q. When you went down there at one o'clock, Mr. Soderberg, and examined that bucket, the fact that the bail—I don't mean the bail, but that the handle of the tripper was bent out that way and this other piece gone, was very evident to you, was it not? A. Why, sure.

(Testimony of Alvin Soderberg.)

Q. That is to say, there was nothing about it that you couldn't readily see, was there?

A. No; it didn't look good to me.

Q. Yes; as soon as you saw it, you could detect that there was something wrong with it?

A. Why, sure.

Q. It was plainly evident that there was something wrong with it?

Mr. WICKERSHAM.—Well, now, I think he stopped me for asking leading questions.

The COURT.—This is cross-examination.

Mr. WICKERSHAM.—Yes; I know it is.

The COURT.—He can answer.

Mr. WICKERSHAM.—I think the witness didn't understand. [149]

The COURT.—What was the answer?

(Answer repeated by reporter.)

Q. There is nothing about those tubs there, or is there, Mr. Soderberg, that can't be seen easily—that is to say, there is no concealed mechanism about them in any way?

A. No; no.

Q. Except that in the case of this rear wheel on the back, it would be a little difficult to see that?

A. Yes.

Q. But all the rest of it is plainly visible—all the mechanism of the tub? A. Yes.

Mr. ROBERTSON.—That's all.

(Whereupon adjournment was taken till 10 A. M., March 27, 1923.)

Tuesday, March 27, 1923,

Court met pursuant to adjournment at 10 A. M.

Testimony of Val. Klemm, for Plaintiff.

VAL. KLEMM, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name to the jury please.

A. My name is Val. Klemm.

Q. How old are you? A. Forty-four.

Q. Where do you reside? A. Ketchikan.

Q. How long have you resided in Ketchikan?

A. Twenty-one years. [150]

Q. What is your business or occupation?

A. Well, I am a miner, but then I do a little longshoring once in a while.

Q. About the month of March, a year ago, what was your occupation?

A. Well, I was longshoring then.

Q. Where?

A. Down on the "Latouche." Well, I wasn't on the boat; I was up on the bunker.

Q. Here in Ketchikan? A. Yes; right in the—

Q. (Interrupting.) You say you worked on the "Latouche"?

A. Not on the boat. I worked up in the bunker, dumping the buckets.

(Testimony of Val. Klemm.)

Q. About the eighth or ninth day of March, where were you working?

A. Well, I don't know the exact dates. I wouldn't remember.

Q. About what time in March were you working there on the "Latouche"?

A. Well, I was working there when there were one or two accidents happened there. I don't know exactly what date it was now.

Q. Do you know the plaintiff here, Barney McHugh? A. Yes, sir.

Q. Do you remember the incident of his being hurt there at one time?

A. Well, I know when I saw them help him out of the hold.

Q. Were you working there at that time?

A. Yes, sir.

Q. Now, tell the jury where you were working.
[151]

A. Well, I was working up in that hopper, right up on top of the dock there.

Q. What were you engaged in?

A. I was supposed to see that the bucket got right square over the hopper and then dump it.

Q. You were dumping the buckets, in other words? A. Yes, sir.

Q. Where were these buckets coming from?

A. Coming out of the hold.

Q. What were they loaded with? A. Coal.

Q. Out of the hold of the "Latouche"?

A. Yes.

(Testimony of Val. Klemm.)

Q. And it was loaded with what? A. Coal.

Q. When did you go to work at that time?

A. I started in after midnight; that is, at one o'clock, I think.

Q. How soon after that do you recall that this plaintiff was injured?

A. It was less than an hour after I went to work. I don't know exactly how long it was.

Q. What did you see of him that night?

A. All I saw of him was when one or two men were helping him out of the hold. He was hopping on one foot—couldn't stand on the other one.

Q. Did you see him come up on the deck, or the dock?

A. I saw them helping him out of the boat; then they took him in a car, took him to the hospital or to the doctor. I don't know where they took him because I had to stay right there [152] at the hopper.

Q. How many buckets were being used at that time? A. I think three.

Q. Three. I wish you would step down here and look at this illustration on the blackboard and see if you can tell what that represents?

A. Well, that looks to me like the buckets they used.

Q. How high were those buckets?

A. Oh, I don't know. Probably that high (showing).

Q. Three and a half, four feet?

A. Not four feet, I wouldn't say.

(Testimony of Val. Klemm.)

Q. Three feet?

A. Probably three feet, or better than three feet.

Q. And about how wide?

A. I don't know. They were around three feet, I guess.

Q. How long?

A. They were a little longer one way on the top there than they were the other way; probably four feet anyway.

Q. What does this (indicating) represent?

A. That is the side that you are supposed to dump with.

Q. And this object marked here, what is that?

A. That is the bail.

Q. What is that bail constructed of?

A. That's pretty good-sized iron or steel; pretty heavy.

Q. What is the bucket constructed of?

A. Steel, I presume; iron.

Q. And the bail, you say, is constructed of iron?

A. Iron or steel. I couldn't tell you.

Q. How large is that iron or steel? [153]

A. Probably one to two. I wouldn't be exact about that, though.

Q. Tell the jury how that bail is arranged there so as to enable the bucket to be tripped?

A. There is a kind of a, kind of a square like that (showing) that is probably an inch and a quarter wide and maybe quarter-inch iron, but it is made square; then there is a lip comes down on that, and you work that lever (showing). This here square

(Testimony of Val. Klemm.)

hole hooks over the pin and that holds it from dumping, and when you dump it, you have to haul on that lever and then take hold of the bucket at the same time, or it will go the wrong way on you.

Q. How long have you worked on this longshore business?

A. Oh, I have done that, off and on, for a good many years. I have done that back on the Lakes, when I was a small boy.

Q. Yes.

A. That is, not steady, but I done longshoring a good deal.

Q. How much work of that kind have you done with this sort of bucket in Alaska, in Juneau or in Ketchikan?

A. I have dumped hundreds of them in Ketchikan—hundreds of them. I done that off and on ever since I have been here. When things were slack and I wanted to make a little extra money, I would go down to the dock when a boat came in and I would pick up a dollar or two.

Q. You say there were three buckets being used?

A. Yes, sir; there was one on each side and one in the middle in the hold.

Q. Did you notice those buckets pretty carefully that night while you were dumping them to see if they were all right or not? [154]

A. I noticed one of them. One of them dumped before it ever got out to the hopper where I was working.

Q. What caused it to dump?

(Testimony of Val. Klemm.)

A. Well, I don't know, unless it was on account of that tripper being broken. It dumped before it ever got to me and there were lumps of coal flying all over, dropped down on the deck overboard and everywhere.

Q. How many of those buckets were out of order in that respect?

A. Well, there was only one that I noticed.

Q. I wish you would tell the jury as nearly as you can what was the matter with that? What caused it to act that way, if you know?

A. Well, it seemed to me that that lever was broken off—that lever down there.

Q. Can you show the jury what you are talking about?

A. It seemed to me that that lever was broken off, because the other two had a little line tied through that hold there—quarter-inch line and then there was an instrument on that and it hooked over a pin here (indicating); but on this one it was broken off; you couldn't fasten it that way. There was nothing to fasten it to, and whenever that bucket would come up and I would have to dump it, I had to take hold of this here (indicating) with my hand and shove up on it, because there was nothing for me to get hold of. I couldn't get—I had to shove this one up that way. There was nothing to take hold of, because it was broken.

Q. Mr. Klemm, from your experience as a dumper of these buckets and from your examination of that particular bucket that night, I will ask you

(Testimony of Val. Klemm.)

as to whether or not it was a safe [155] appliance to be used in that class of work.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial.

A. Well, I wouldn't think so.

The COURT.—Wait a minute. He may answer. Objection overruled.

A. I wouldn't think it was safe, because there was no way of holding that, because there was no way of holding that, because, for illustration, I think it was the first or second bucket that come out of the hold—you hoist the bucket out and give it a kind of a swing, you know. The winch driver did. You know, he wasn't kind of careful enough; he kind of jerked it a little bit and the bucket was going back and forth enough to throw that little tripper up and it tripped. The bucket dumped itself before it ever got out to me.

Q. If this handle had been tied to this peg that you speak of with the usual lanyard or string, would it have done that? A. No; I don't think so.

Q. No.

A. I don't see how it could.

Q. What was there on this bucket by which it could be handled or pulled around?

A. I don't know. I don't know if there was anything on it. I usually grabbed hold of the edge of the bucket when it come in to steady it.

Q. Yes.

A. I didn't notice anything on it. There might

(Testimony of Val. Klemm.)

have been something on it. I don't know. I wouldn't say.

Q. Were there any ropes on it, or anything?
[156]

A. I don't know.

Mr. ROBERTSON.—Now, we object to that as leading.

Mr. WICKERSHAM.—And I am going to continue to ask him that if the Court—

Mr. ROBERTSON.—We certainly object to it as leading.

Mr. WICKERSHAM.—If counsel will sit down and not get excited—

A. (Interrupting.) Well, I didn't notice any ropes on it. They may have been on there, or they may not. I never used them. I would just take hold of the edge of the bucket.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Mr. Klemm, do I understand that you are the hopper man that went on shift at one o'clock?

A. Yes, sir.

Q. Did you have occasion yourself to go down to the hold of the ship?

A. No, sir; I had no business there.

Q. And your business was solely confined to the work up on the hopper?

A. Absolutely. I had no business off of that hopper.

(Testimony of Val. Klemm.)

Q. You know how many men were working down in the hold? A. I couldn't tell you.

Q. Do you know how many tubs were working in the hold? A. Yes; there were three.

Q. How do you know there were three working in the hold?

A. Because I know they would take one from one wing and then they would take one out of the center and then the other [157] out of the other wing; so there must have been three gangs down there and three tubs.

Q. Could you see that?

A. Yes, I could, from where I was. I was above the hold of the boat. You could look right down into the hold.

Q. From where you were, twenty-five or thirty feet away, was there sufficient light for you to see down into the hold and to see that there was a gang—

A. (Interrupting.) There was plenty of light in the hold, but there was no light between me and the hold except a lantern hanging behind me.

Q. There was no light by you except a lantern?

A. A lantern behind me on the coal bunker; that's all.

Q. Now, then, what was your ordinary custom in dumping the buckets after they got up to you on the hopper? Will you explain that again. How do you dump them?

A. You unhook that little rope on there (indicating).

(Testimony of Val. Klemm.)

Q. This rope here (pointing)? A. Yes.

Q. This rope is leading from the end of the trigger and over here, what is that?

A. Oh, that's the pin. That's the pin; you unhook that rope and pull the lever and that lets go of the pin here (indicating) this here, in that way (showing). Well, then, when you lift it this way, why the bucket will unhook this pin (indicating). This will unhook this pin, this dog or whatever you call it, then you can swing your bucket, balance it and dump it.

Q. What did you do—give that thing a little tug, kind of a little tug when you trip it? [158]

A. No; I do not. All you have to do is to move that lever.

Q. You have got to move the lever over?

A. You have got to pull it a little bit.

Q. With a rope?

A. No, not with a rope. You don't use a rope at all.

Q. You don't use a rope at all?

A. No; not in dumping it.

Q. You take hold of the tripper and put that down (indicating)? A. Yes.

Q. Move that way? A. Yes.

Q. How much coal about did the buckets hold?

A. I don't know. I didn't weigh any.

Q. What is the usual amount of coal taken out in a tub of that kind—about a ton, three-quarters of a ton?

A. No; I don't think they hold that much; prob-

(Testimony of Val. Klemm.)

ably eight, nine hundred pounds. I'm just guessing at it.

Q. I see. Well, you think it is at least that much, don't you?

A. Well, I don't know about that. It may be less than that.

Q. It might be even less than eight or nine hundred pounds?

A. Yes; and it may be a half a ton. It may be anywhere from five hundred to half a ton.

Q. Now, then, when the bucket is suspended in the air, there is a hook up here on the bail (indicating), isn't there?

A. Yes; there is an eye in the bail up there, and there is a hook of the winch, of the cable hooks in that.

Q. And the weight is suspended, is it not, on that; that is, it hangs down, the whole weight is suspended from this hook, isn't it? [159]

A. I would think so. When it hangs in the air, everything is hanging off that hook.

Q. I see. At that time does the bail bring any pressure to bear down on this little place here (indicating), down on this catch? A. I don't know.

Q. You don't know?

A. No; I don't know. That's too deep for me?

Q. That's too deep for you? A. Yes.

Q. And when the tub got out to you, this particular tub, you simply shoved up on your hand and pushed up?

(Testimony of Val. Klemm.)

A. Yes; there was no lever there to take hold of. I take and lift it up with my hand.

Q. Yes; I see.

A. I put my weight against the bucket to straighten the bucket up. If there was too much coal on one side of the bucket, I would have to put my weight against it; otherwise she would come up even. If it wasn't loaded about even, then I would just move it by hand, keep my hand on it all the time to keep it from going the wrong way.

Q. You had to lift up with your hand; you had to take the swinging bucket and endeavor to balance it so as to loosen the catch, is that what you mean? A. No.

Q. Is it then you shove up with the other hand?

A. Yes, if it is overbalanced one way, you would have to; yes.

Q. If it is overbalanced which way, Mr. Klemm?

A. Well, let's see—well, anyway I guess. [160]

Q. If it is overbalanced any way—if it is too much any way, there would be some pressure on that, I would think. I don't know, though. I'm just asking you what—

A. (Interrupting.) I can't remember everything a year ago. I haven't worked on one of those coal buckets since.

Q. You have had a lot of experience before this, but you haven't worked with one of those coal buckets since?

A. I haven't handled any coal since that time.

(Testimony of Val. Klemm.)

Q. Now, then how fast did the buckets come up that night? A. Well, I don't know.

Q. About how frequently did the buckets come up to you on the hopper?

A. Come up, one in less than every five minutes, I should think one every five minutes at least.

Q. At least one every five minutes?

A. Or less than that.

Q. Somewhere in the neighborhood of twelve buckets an hour?

A. I don't know exactly how many. I didn't have no chance to count them.

Q. But you say at least one every five minutes. Is that correct?

A. Well, no that isn't correct, because, as I say, I didn't time them.

Q. I know you didn't time them—

A. (Continuing.) I don't know; perhaps they come up every five minutes and then maybe there would be ten or fifteen minutes between the tubs.

Q. Between the tubs? A. Yes.

Q. How many— [161]

A. (Continuing.) Maybe longer.

Q. How many tubs came up before McHugh was hurt?

A. Well, there wasn't more than four or five, I don't think.

Q. There wasn't more than four or five?

A. No, there wasn't very many; probably there was six or seven, but I don't think there were any more than that.

(Testimony of Val. Klemm.)

Q. You don't think there could possibly have been eight or nine?

A. No; I don't think so. I think he got hurt before there were that many come out. I would be sure of that.

Q. Up where you were working on the hopper, it was quite dark, was it?

A. Well, we had a lantern up there behind us.

Q. Just an ordinary coal oil lantern?

A. Common coal oil lantern.

Q. How far was that sitting away from you?

A. Oh, probably—maybe four or five feet.

Q. Pardon me.

A. There was a stake nailed up there and it was hanging on the nail on that stake.

Q. Was that all the light you had?

A. That was all the light I had to see the bucket. That was just enough to show me which side of the bucket the tripper was on and how to handle the bucket. That was all.

Q. In that light, you had no difficulty in finding out the defect in this tub?

A. I could find that out if I had no light at all. I could feel that.

Q. You could feel that?

A. There was no way to hook it on. [162]

Q. I see. In this instance, are you testifying from what you saw or what you felt?

A. I am testifying from what I saw.

Q. Well, then, there was light enough for you to see? A. Yes.

(Testimony of Val. Klemm.)

Q. You could see to testify? A. Yes, sir?

Q. That is correct? A. Yes, sir.

Q. How old were you when you were a small boy operating one of those buckets on the lakes?

A. I never operated one of those coal buckets on the lakes. I was about seventeen years old when I was longshoring.

Q. You were longshoring when you were seventeen years old, but not operating tubs?

A. No; not on the coal boats.

Q. You didn't do any of that work until you came to Ketchikan? You didn't handle coal buckets until you came to Ketchikan, is that right?

A. Yes.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

Testimony of Bernard McHugh in His Own Behalf.

BERNARD McHUGH, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. You may state your name? [163]

A. Bernard McHugh.

Q. How old are you? A. Thirty-nine.

Q. Are you a married man? A. Single.

Q. Have you any family?

A. I got a mother, two brothers and one sister. I got no family, though.

(Testimony of Bernard McHugh.)

Q. How long have you resided in Alaska?

A. Seven years.

Q. Where have you lived in Alaska?

A. When I first came to Alaska, I worked fourteen months at the Kennecott mines and I went from there to Fairbanks. I lived there one year. Afterwards, I came down to Cordova. In 1919, in the spring of 1919, I came to Juneau from Cordova. In the summer of 1919 I was working in a logging camp down in Rocky Pass, from the 28th of June to some time around the first of February, first week in February. After the Fourth of July, 1919, I worked two months on the school that was built at Juneau, up at the Sisters' Hospital, for about two months. I went from there to a mine out from Juneau about sixty-five miles, called the Jualin mine. I worked there about two months, and I worked for the Road Commission out of Juneau after that, for a while. In the spring of 1920 I went to Hyder and I worked at Hyder till—I worked about a year, or eleven months. I worked till the middle of July, 1921. I came back to Ketchikan and I went up to Anchorage, and I went to work in the coal mines, government coal mines, above Chickaloon, out at Eska Creek, at the Eska Creek coal [164] mines above Matanuska. I come down from there in December, 1921, and I went to Hyder, stayed there about two weeks, but I didn't work because there was a great snowslide between Hyder and the mine and they couldn't haul provisions up; so they didn't hire men on that account be-

(Testimony of Bernard McHugh.)

cause the road was blocked and they had to get the snow off first, and I come back to Ketchikan, before Christmas, 1921. On the sixth of January, 1921, 1922, I went out to work at the Moonshine mine, a little distance out of here, forty-five, fifty miles. I worked there a month and the compressor got on the bum and so they said they had to lay us off for a matter of two weeks until they got the compressor fixed; so I come back to Ketchikan and I didn't work any more until I went longshoring on the "Latouche" on the eighth day of March, 1922.

Q. And after that what have you done?

A. I went to work on the "Latouche" on March the eighth and at seven o'clock in the evening. I worked five hours until twelve and we went to supper at twelve. Some of the men, some of the crew that shoveled coal before twelve, they quit. They told the longshoreman boss at twelve o'clock—

Mr. ROBERTSON. (Interrupting.) Now, wait a moment—

Mr. WICKERSHAM.—No.

Q. What did you do after one o'clock?

A. I went to work.

Q. Went to work again? A. Went back to work.

Q. Now, then, let me ask you some questions. When did you say [165] you came to Alaska?

A. 1916.

Q. 1916. What job did you first have after you came here? A. Came to Alaska?

Q. Yes. A. At the Kennecott Mine.

(Testimony of Bernard McHugh.)

Q. What occupations have you followed in your lifetime, Mr. McHugh?

A. I'm a plumber by trade.

Q. But in Alaska have you worked at your trade?

A. Yes, sir.

Q. How much of your time?

A. I worked for seven months; about eight months at Hyder. I worked at Hyder at my trade all but the first six weeks I was there. I worked as a laborer, but I asked for a job as plumber when I first went there, but I didn't get it for six weeks.

Q. How long did you work at your first job?

A. I worked from the first of March to the 16th of June, the year after.

Q. You worked from the first of March to the 16th of June the following year? A. Yes, sir.

Q. You mean that you worked more than one year?

A. Well, that is the way I went to work.

Q. I don't quite catch whether you mean you worked from March to June—

A. (Interrupting.) I worked pretty near fifteen months, fourteen months.

Q. Where was this? [166]

A. Kennecott mines.

Q. What were you doing there?

A. I had pretty near every position on the mine. I had a bulkhead job for a few weeks. I got that because I refused to go mucking. I told them I would go down the hill if I didn't get a job besides mucking.

(Testimony of Bernard McHugh.)

Q. Then what did you do?

A. He gave me a job as handy man. I made different things and I timbered a shaft 190 feet, and I put in an air ventilation for the compressor room. I used galvanized pipe for the ventilation. I put some pegs and planks across made independent platforms every sixteen feet and when I gets through with that I puts that ventilation pipe in. It was to ventilate the compressor room that was in the mine about a distance of a quarter of a mile in a tunnel, and this ventilation shaft extended to the surface.

Q. Well, now, is that the general character of the work that you did there? Did you do anything else?

A. I worked on the surface. I never worked in the mine. I refused to work in the mine, because I never saw a mine until I came there. That's the first mine I ever saw.

Q. Have you described to the jury the character of work you did at Kennecott?

A. That is the nature of the work that I did there.

Q. How long did you do that kind of work at Kennecott?

A. About fourteen months and a half.

Q. What compensation did you receive?

A. I made an average of— My checks were from \$125 to \$147 a month clear of my board. [167]

Q. What is that?

A. The pay checks that I received averaged,

(Testimony of Bernard McHugh.)

some of them was a hundred and twenty-five a month, and they were as high as one hundred and forty-seven, and some of them, the first time I went there, the first few weeks, they were below a hundred; they were around ninety-five, and they kept raising me as the copper. They paid a rate of wages there on a scale according to the price of copper. I was paid a certain amount for wages and a bonus scale.

Q. Did that include your board, or was that aside from your board?

A. That was aside from my board.

Q. That was in addition to your board?

A. Yes, sir.

Q. When you had worked there fourteen months, as you have stated, where did you go?

A. I started towards Fairbanks. I decided to go to Fairbanks, so I left Chitina, but I went to work on the government trail before I reached Fairbanks, and I worked the remainder of the summer there.

Q. How much did you receive there?

A. I received five dollars and board. I worked between Munson and Fairbanks, on the Fairbanks end of the road?

Q. What character of work did you do on the road?

A. Mostly axe work. They were building bridges and culverts; repairing bridges and culverts.

Q. How long did you work there?

A. I worked from about the 18th. I left Chitina

(Testimony of Bernard McHugh.)

the sixth of [168] July and I must have got this work about, after the 15th of July. I went to work there and I worked from then on till about the last days of October.

Q. Then what did you do?

A. I went out to Tolavana and I went to work with other fellows that was working on a claim, and I worked with them for the winter months and they washed their dump in the spring when the water first started to run.

Q. Yes.

A. And we divided the pay; so I quit. I pulled away from them and went into Fairbanks and took a rest for a few weeks.

Q. What was your compensation there?

A. I made about, we made about \$1100 each for the winter's work.

Q. For how long a time?

A. Oh, we worked about four months and a half or five months. We were longer than that on the job, but there were days when we didn't work; they were too cold, and we lost a lot of time.

Q. How much do you say you received as your share of that work?

A. I received \$1100.

Q. That was at Tolovana? A. Yes, sir.

Q. Where did you go from there?

A. I went into Fairbanks and took a rest for about three weeks, and I took station work on the Fairbanks end of the road.

Q. What?

(Testimony of Bernard McHugh.)

A. I took station work on the Fairbanks end of the road, the railroad; they were building the road. The steel wasn't laid. [169]

Q. On the railroad? A. Yes.

Q. How long did you work there?

A. I worked for three months. I went to work about the 28th of July and I worked until the thirtieth of October. The frost came and I had to quit.

Q. What character of work did you do?

A. I worked with a pick and shovel and a wheelbarrow and four planks that extended sixteen feet along to run on for this wheelbarrow.

Q. In other words, you were grading? A. Yes.

Q. With a wheelbarrow, pick and shovel.

A. Yes.

Q. How did you break up the rock or the material which you were handling?

A. It was soft mud—frozen mud. It was soft at that time. There was no rocks there whatever. We didn't need a pick even.

Q. What did you make there?

A. I made nine hundred and eighty for a little better than three months.

Q. Where did you next work?

A. The next work I did—I left Fairbanks the last days of November and I walked to Chitina and I came on to Cordova and I did a little longshoring that winter in Cordova because I wasn't—I wouldn't have gone longshoring only that being the winter of 1918, I was quarantined at Cordova

(Testimony of Bernard McHugh.)

and at the time the quarantine come on, you wouldn't [170] be allowed out of town.

Q. Where did you work at longshoring?

A. Down at the dock.

Q. What dock? A. On the Cordova dock.

Q. You mean on the railroad dock?

A. Yes. I worked on a flatcar, throwing sacks of ore—there was two men to a sack—with a hook. Each had a hook with a handle on it and we would hook on to these sacks and throw them on to a sling or wire netting, whatever it was.

Q. How long did you work at that?

A. About two weeks, probably a little more. The weather was bad—snow and rain.

Q. What did you receive for that?

A. They paid at the rate of \$170 a month.

Q. Where did you go from there?

A. (Continuing.) Is what they paid, but I only worked for two weeks and a few days.

Q. Where did you go from there?

A. I came down to Juneau.

Q. What did you do in Juneau?

A. I went out to a logging camp.

Q. Where was that logging camp.

A. At Rocky Pass. That was in the spring of 1919.

Q. How long did you work there?

A. I worked about five months.

Q. What did you do—what class of work?

A. Well, there was only five men in the camp, five or six; I forget how many. There was five

(Testimony of Bernard McHugh.)

men in the camp. They had [171] a logging donkey and at the time they were hauling piling I bucked wood with a cross-cut saw and split it and fired the donkey at the time they used the donkey to haul logs.

Q. How long did you do that work?

A. Well, we didn't haul every day, because—

Q. (Interrupting.) How long were you there?

A. I was there five months.

Q. And about what did you earn there?

A. We got six dollars and board and we got half a shift for overtime. We did a lot of overtime; that is, we would have to go out at high tides and chain up the piling that they hauled out.

Q. You say you got six dollars and board. What do you mean? Six dollars for what time.

A. I got six dollars for eight hours and my board.

Q. And your board. When was that?

A. That was in the spring of 1919.

Q. Then where did you go?

A. I went back to Juneau. I quit this camp, or we were through. I left there the 28th of June and I went to Juneau.

Q. What did you do there?

A. I laid off for about a week till about the seventh or eighth of July when I went to work on the school that was building, that the Sisters built up on the hill there at Juneau.

Q. How long did you work there?

A. Pretty near two months—seven weeks.

(Testimony of Bernard McHugh.)

Q. What did you do?

A. I was carpenter helper.

Q. What did you do in that class of work? [172]

A. I used a hammer and drove nails; used the saw once in a while.

Q. And you worked at that about seven weeks?

A. About seven weeks.

Q. What compensation did you receive for that?

A. I got six dollars a day for eight hours.

Q. Then where did you go?

A. I went out to the Jualin mine.

Q. How long did you stay out there?

A. I stayed out there about nine weeks.

Q. What did you do?

A. I shoveled rock into a car. They was driving a tunnel there.

Q. How long did you work there?

A. About nine weeks.

Q. What compensation did you receive?

A. This was a contract. I don't know how we were paid. Three and a half a day and a bonus. It was a funny kind of a contract.

Q. Three and a half a day, and what about your board?

A. We made—I made \$167 a month and 155 clear of my board and 145, and so on; like that.

Q. How long did you say you worked there?

A. Nine weeks.

Q. Where did you go from there, Barney?

A. I worked out on the road for the Road Com-

(Testimony of Bernard McHugh.)

mission. I worked on the road out of Juneau, out towards the glacier, at the end of that road.

Q. How long did you work there?

A. I worked there about three months. [173]

Q. What character of work did you do?

A. This was in the winter time. They were blasting rock.

Q. What did you do?

A. We were throwing this rock after they blasted. We were spreading it out, throwing it down the cliff. This road was around a bluff.

Q. Did you do that kind of work? A. Yes, sir.

Q. How long? A. About three months.

Q. What compensation did you receive for it?

A. We were paid four dollars and board for eight hours.

Q. You say that was in the winter-time?

A. Yes, sir.

Q. What winter?

A. That was the winter of 1919.

Q. Where did you go from there?

A. I went to Hyder. The next work I did after that was in Hyder.

Q. When did you go to Hyder?

A. Spring of 1920.

Q. What time, can you remember?

A. The last of May, about.

Q. What did you do in Hyder?

A. I asked for a job as a plumber as I went there. The manager told me they didn't have much work at the present time, that they had one plumber

(Testimony of Bernard McHugh.)

working, and he told me if I took a job as mucker, why the first opportunity there will be, I will give you a show with the plumbing job. [174]

Q. Well, what did you do? Did you go to work as a mucker?

A. I went to work at the logging camp. They had teams hauling logs out to a sawmill. They used to haul those logs with a go-devil, and I used to roll the logs on to this go-devil.

Q. How long did you work at that kind of work?

A. About six weeks.

Q. What compensation did you receive for it?

A. I got six dollars a day.

Q. Six dollars a day and what about your board?

A. I paid board out of that; paid a dollar and a quarter for board.

Q. You got six dollars and paid \$1.25 for board?

A. Yes.

Q. How long did you work there?

A. About six weeks.

Q. Then what did you do?

A. I went to work as a plumber.

Q. Where did you work as plumber?

A. I did plumbing in the manager's residence and in the bunkhouse, when there was nothing to do; besides, I did pipe fitting in the mine.

Q. How long did you work at that?

A. About eight months and a half.

Q. What compensation did you receive for it?

A. Seven fifty a day, for eight hours.

Q. What about your board?

(Testimony of Bernard McHugh.)

A. I paid board out of that.

Q. How much?

A. Dollar and a quarter. [175]

Q. So you received seven fifty, minus a dollar and a quarter? A. Yes sir.

Q. For about eight months?

A. For about eight months and a half.

Q. Can you remember when you ceased to work there? A. About the 11th day of May.

Q. What year? A. 1921.

Q. 1921. Where did you go then, Mr. McHugh?

A. I went up to Anchorage when I left Hyder.

Q. About what time did you get up to Anchorage?

A. I stayed around in Ketchikan for a few weeks. When I left Ketchikan, my intention was to go to Mayo and I bought a ticket to Skagway and I got off there, but I changed my mind. I got "cold feet," and I had to wait there for a boat, to get a boat to take me to Anchorage. After I got to Anchorage, I took another rest there. I didn't work. I didn't ask for work of anybody for a few weeks. I could have got work on the road. I am not a railroad man anyway.

Q. What?

A. I could have gone to work on the road. I never worked on a road and I went to work out in the coal mine.

Q. What coal mine? A. Eska coal mine.

Q. How long did you work in the Eska coal mine?

A. I must have gone to work there the first of

(Testimony of Bernard McHugh.)

September and I worked there till about the middle of November. It shut down then. [176]

Q. You worked there about a month, you think?

A. I worked there about two months and a half.

Q. About two months and a half. What compensation did you get for that?

A. I got \$8.75 a day, and a dollar and a half a day board off from that; in fact, they pay the same wages to-day at the Anchorage coal mines.

Q. Where did you go after you left the Eska coal mine? A. I came back to Hyder.

Q. You didn't work at Hyder then?

A. No, sir; I stayed there at Hyder two or three weeks.

Q. There was no work and you came away?

A. No, they weren't hiring anybody at that time.

O. Where did you go to then?

A. Came to Ketchikan.

Q. When was that?

A. That was in 1921, in December.

Q. 1921? A. Yes, sir.

Q. In December, did you say? A. Yes, sir.

Q. When did you begin working on the "Latouche" down here? A. The eighth of March.

Q. The eighth of March, what year? A. 1922.

Q. Had you been in Ketchikan from the time you came here in December until you began to work on the "Latouche"?

A. No, sir; I went out to work at the Moonshine mine the sixth [177] day of January, and I worked there about a month, and it was a one-horse

(Testimony of Bernard McHugh.)

outfit and the compressor gets on the bum, so he needed to repair it and come into town, and he laid us off; said there would be no work for about three weeks. He wanted me to go out again, but I refused to go.

Q. Now, have you given generally all the places you have worked during the period that I have questioned you about?

A. As near as I can remember.

Q. Prior to that, where did you work? Did you ever work in Seattle? A. Yes, sir.

Q. What business were you in there?

A. I was in the plumbing business.

Q. How long?

A. I came to Seattle from San Francisco, in the spring of 1908, and I worked in Seattle till the spring of 1911.

Q. What did you do there?

A. I worked as a plumber.

Q. All the time? A. Yes, sir.

Q. And when you left Seattle, where did you go to? A. Vancouver.

Q. How long were you there? A. Two years.

Q. What did you do there?

A. I worked as a plumber.

Q. All the time?

A. I was in business, in fact, for myself. [178]

Q. All the time? All the time you were there?

A. Yes, sir.

Q. And then where did you go?

A. I went to Victoria.

(Testimony of Bernard McHugh.)

Q. How long were you there?

A. I must have been there about fifteen months.

Q. What did you do there?

A. I worked as a plumber.

Q. Then where did you go?

A. I come back to Seattle.

Q. How long did you remain there?

A. About a year and a half.

Q. Then where did you go?

A. Come back to Alaska.

Q. What did you do while you were in Seattle this last time?

A. After I came from Vancouver?

Q. Yes.

A. I worked as a plumber.

Q. You worked as a plumber? A. Yes.

Q. And you came to Alaska, you say, in what year? A. In the spring of 1916.

Q. How old are you? A. Thirty-nine.

Q. What kind of health have you had during all these years you are talking about?

A. I have never been sick.

Q. Are you or are you not a strong man?

A. Strong physically in every way, only my foot at the present [179] time.

Q. And you are thirty-eight years old or thirty-nine?

A. Thirty-nine. I'll be thirty-nine next October.

Q. Now, tell us about going down on board the "Latouche" to work. What day did you go there?

A. I was hired on the eighth of March, 1922.

(Testimony of Bernard McHugh.)

Q. What time did you go to work?

A. I went to work at seven o'clock in the evening.

Q. Who employed you?

A. The longshore boss.

Q. What was his name, do you know?

A. Well, I don't know his name. I didn't know his name at that time, but I have heard—I don't really know his name yet, any more than what I have been told, that his name is Pauzi or Pozi, or some name like that.

Q. What did he say to you when he employed you about your work?

Mr. ROBERTSON.—Now, if the Court please, that is entirely—

Mr. WICKERSHAM. (Interrupting.) I want to ask him if he gave him any instructions.

A. At the time he hired me to shovel coal, he asked me how I was on the muck stick.

Q. What did you tell him?

A. I told him I used it in other places.

Q. Did you ever work on board a boat before, in that class of work?

A. No, sir; that was the first time I ever worked aboard a ship.

Q. Had you ever worked in the hold of a boat, unloading coal before that night?

A. No, sir. [180]

Q. Had you ever had any experience in handling coal buckets such as is represented by this illustration on the blackboard before you before that night?

A. No, sir.

(Testimony of Bernard McHugh.)

Q. Were you given any instructions that night about how to manage this bucket or the business generally?

A. The only thing that was ever told to me is what the longshore boss asked me at the time he hired me.

Q. If you could handle a muck stick?

A. Yes, sir.

Q. What did he mean by that?

A. He meant that that was the kind of a man he wanted for that job.

Q. What did he mean by muck stick?

A. To shovel coal into those iron buckets.

Q. What time did you go to work?

A. Seven o'clock in the evening.

Q. Where did you work?

A. I worked in the hold on board the boat "La-touche."

Q. How many men were at work at that time?

A. There was eight men in the hold as I went in that night.

Q. And you made the ninth? A. I made nine.

Q. How many buckets were used?

A. Three buckets.

Q. How many men worked at each bucket?

A. There were three men on each bucket.

Q. Who worked at the bucket with you? [181]

A. There was a native boy and a white man.

Q. Have you seen the native boy recently?

A. Before twelve o'clock, the first five hours I was there, there was two white men.

(Testimony of Bernard McHugh.)

Q. Two white men? A. Yes, sir.

Q. And after twelve o'clock or after one o'clock?

A. At twelve o'clock we had supper and some of these men quit. They told the longshore boss, or told somebody at the time they got out on the deck of the boat, that they weren't coming back after supper. They wanted to know when they were going to get paid and they told them they wouldn't get paid until the next day.

Q. Then after one o'clock you came back to work again? A. Yes, I came back to work.

Q. Who worked in your gang of three then?

A. There was a native boy and a white man.

Q. Who was the native boy?

A. At that time I didn't know his name, but I learned his name afterward. His name is Frank Williams.

Q. Is he the man that was on the witness-stand here yesterday? A. Yes, sir.

Q. Now, you went to work at seven o'clock?

A. Yes, sir.

Q. What did you do?

A. I shoveled coal in a bucket something similar to that (indicating), in make to that one.

Q. Did you ever see one of those buckets before?

[182]

A. Yes, I have saw coal buckets before.

Q. Had you ever worked with one? A. No, sir.

Q. Did you ever have any experience in the management of one? A. No, sir.

Q. Who run the bucket in your gang of three?

(Testimony of Bernard McHugh.)

Who had experience, if you know? Who managed the bucket before dinner that night?

A. The fellow that quit seemed—me and the other fellow seemed to leave it up to him. He *god* hold of the bucket ahead of us and mostly hooked that hook on to it. He would go and take the hook off the other buckets and hook it on at the time we loaded it, and I did that mostly after one o'clock, after he quit.

Q. Did you know the mate on the boat?

A. No, sir.

Q. Who was in charge that night?

A. No, sir.

Q. Would you know him now if you saw him?

A. No, sir.

Q. Did you see the mate down there at any time after seven o'clock and before twelve?

A. There was nobody down in the hold at any time while I worked there, only the men that shoveled coal.

Q. Now did you have any trouble with the bucket that you worked with before twelve o'clock?

A. No, sir.

Q. You worked shoveling coal into the bucket right along after twelve o'clock. [183]

A. Yes, sir.

Q. And do you know whether the bucket was in order or not? Do you know anything about that?

A. I don't know whether it was in order or not. I never examined it.

Q. Why?

(Testimony of Bernard McHugh.)

A. Well, I expected that it was in good condition, in working condition.

Q. Had you ever examined a bucket like it before? A. No, sir.

Q. Had no experience with such a bucket?

A. I never worked with a bucket like that before. Mr. ROBERTSON.—That certainly is leading.

Q. You quit at twelve o'clock and went to dinner?

A. Yes, sir.

Q. At midnight? A. Yes.

Q. And when did you go back to work again after midnight? A. At one o'clock.

Q. Now, who worked with you after one o'clock on that bucket?

A. There was a native boy and a white boy.

Q. The native boy you say was Frank Williams?

A. Yes, sir.

Q. How long did you work after one o'clock?

A. I worked about twenty minutes.

Q. About what?

A. About twenty minutes, or thereabouts.

Q. When you were paid off, how long were you paid off for? [184] A. I couldn't tell you.

Q. You don't know?

A. I was suffering too much. Money didn't trouble me at the time.

Q. Well, about twenty minutes after one o'clock, you may tell the Court and jury just what happened to you?

A. At about twenty minutes past one, or thereabouts, I don't know exactly what time it was; I

(Testimony of Bernard McHugh.)

don't know how long I was working after one o'clock. The bucket at this time was lowered by the winchman to the floor of the first hatch and the coal was shoveled—there was no coal around there except what was in underneath the sides. There was some in front of the winchman, extending down on a slope and that side on the floor around where the open space is was all shoveled up and we were shoveling from underneath the wings, or whatever you might tell them—

Q. (Interrupting). Wings is good enough.

A. The bucket was lowered down by the winchman at that time and landed in position somewhere on the floor or the deck and this man that gave evidence for me yesterday, Soderberg, he comes over to Mr. bucket and hooks this hook off, takes that side (indicating) or grabs hold of it at the back on the center of the rim. I got hold of it with my left-hand and the native boy was on one side and the white man on the other and I was pulling on the back and as soon as we started to get it going, we gave a pull—we were coming about two or three feet, I should judge, when it fell to pieces and the bail struck me on the arch of my left foot.

Q. Where were you standing when the bail fell? [185] A. I was standing at the back.

Q. What were you doing?

A. I was pulling on the bucket.

Q. Where had you stood before and pulled on that bucket? A. Mostly at the back.

Q. Well, at any other place?

(Testimony of Bernard McHugh.)

A. At other times, before twelve o'clock, sometimes if I would be the first one that would get to the bucket, I would grab hold of it, usually on the side that was next to me, whether it was the front or the back.

Q. What was your custom about pulling it or pushing it by the back or the front? How did you do that?

A. Well, we just grabbed hold of it the easiest way that we could get hold of it and just pulled it or pushed it during the time that I worked there.

Q. What was under that bucket to enable it to go easily? A. There were three rollers.

Q. Something like that? A. Yes.

Q. Which way could you push or pull the bucket?

A. You could either push it or pull it either way, or you could turn it any time after you wanted to move it on the floor. It would swing or go in any direction if you pushed it in that direction.

Q. What was your custom about pushing it or pulling it by the snout? Which part went in first towards the coal?

A. As a rule, it stood mostly on the side for to shovel the coal in. At the time we were shoveling coal underneath the wings, and if the front of the bucket would be facing the coal, there wouldn't be room for all three of us. We [186] would have to have a little cargo space in which to stand for to, in order to shovel the coal into the bucket.

Q. And who managed this hook on the tub?

A. Most any of us.

(Testimony of Bernard McHugh.)

Q. Most any of you.

A. At any one time. Nobody in particular.

Q. Now you worked after twelve o'clock with Frank Williams and this other man. Who was the other man?

A. I didn't know his name, but at the time that I was in the hospital, there was a fellow came to see me—

Q. (Interrupting.) Well, if you didn't know his name, you need not tell what somebody told you.

A. I don't know the man's name.

Q. Have you seen him since? A. No, sir.

Q. Do you know where he is?

A. I heard that he went and bought a ticket to Cordova.

Q. How soon after you were injured?

A. During the time I was in the hospital. I heard this. I don't know if the man went there or not, but this is what I was told.

Q. You don't know the man's name?

A. No, sir.

Q. Or where he is? A. No, sir.

Q. Now when this handle fell, what did it do to you?

A. It struck me on the arch of my foot and broke two bones and injured another one. [187]

Q. What part of the handle struck your foot?

A. That there part that sticks up where the hook goes on, where you hook the hook on.

Q. Above the handle here (pointing)?

A. Yes.

(Testimony of Bernard McHugh.) *

Q. What was it above that handle that struck your foot?

A. Well, it was just the piece, sticks out there (indicating), of steel there, with a hole to hook the hook on.

Q. What was that?

A. Oh, it was about two inches square, with the hole in it it would make that, maybe, an inch and a quarter. It was in a round shape on the top.

Q. What was that round piece used for?

A. To have this hole here (indicating) for the hook to hook on.

Q. To hook the hook on. What do they hook the hook on there for.

A. For the winchman to hoist it up.

Q. It was hoisted by that round hole?

A. Yes, sir.

Q. What part of that apparatus was it that struck your foot?

A. That apparatus that extends above that line (indicating); that hit my foot.

(Whereupon a short recess was taken.)

(Court met pursuant to recess.)

Testimony of Val. Klemm, for Plaintiff (Recalled).

VAL KLEMM, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.) [188]

Q. Mr. Klemm, you say you went to work there at one o'clock? A. Yes, sir.

(Testimony of Val. Klemm.)

Q. I wish you would tell the jury again about when it was that the first bucket dumped?

A. Why—

Q. How soon after you went to work.

A. That was either the first or second bucket that came out.

Q. Yes.

A. And it dumped about five or six feet outside of the hopper just abreast of me, about on the same level, and if it swung out a little more to the side and dumped, it would probably have knocked me off the platform—

The COURT.—(Interrupting.) Never mind that. The last part of the answer may be stricken. He didn't ask you what it might have done.

Q. I will ask you this question: did you have any conversation at that time with the mate about that bucket? A. Yes, sir.

Q. Now just tell the court and jury what conversation you had with him about that at the time this bucket dumped.

A. Well, he said something about that bucket dumping down there and I told him that the bucket dumped before it ever came up to me. I didn't dump it; I had nothing to do with dumping it.

Q. What else did you say?

A. And I told him—The winch-driver would swing his bucket over to me so it would go down the hold the right way, you know—right side up, and when I hooked it up, I saw that the catch was broken. There was something wrong with it.

(Testimony of Val. Klemm.)

[189] The catch was broken; and I told him that the bucket is liable to dump any time; it's dangerous. I said, "Somebody is liable to get hurt with that bucket." I told him, "You oughtn't to use that bucket."

Q. What if anything, did he say?

A. He said he only had three buckets; probably have to knock off one gang. He didn't say that to me, but he said that was all the buckets he had, was the three of them.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Who did you tell that to?

A. Why, I spoke to the mate.

Q. Who was the mate?

A. Well, I couldn't tell you. It was dark down there. I couldn't recognize the mate from where I was.

Q. How far were you away from him where you were?

A. I was probably thirty or forty feet; thirty or thirty-five feet.

Q. And you called to him?

A. He spoke to me and I spoke to him.

Q. And that was when the bucket, the first bucket dumped after you came on shift?

A. Probably the first or second bucket. I wouldn't say. It dumped in midair.

Q. The bucket was used after that?

A. Why, yes; it was used, all right.

(Testimony of Val. Klemm.)

Q. Used all right.

A. Yes, sir; that is, it was used up to the time the boat left. [190] The boat left around one o'clock, somewhere around one o'clock in the day.

Q. You stayed on shift until the next day when the cargo of coal was fully discharged and this bucket was used all the time?

A. I stayed there until all the coal was discharged that was to go off here. She still had more coal on.

Q. But I mean the cargo of coal for Ketchikan.

Mr. ROBERTSON.—That's all.

**Testimony of Bernard McHugh, in His Own Behalf
(Recalled).**

BERNARD McHUGH, the plaintiff herein, recalled in his own behalf, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. McHugh, I wish you would tell the jury about how much money you have received for your labor that you have recounted to the jury, per annum, per year, since you have been in Alaska?

A. About \$1800 or \$2000 a year.

Q. Prior to the time you were hurt?

A. Yes, sir.

Q. Now since that time what have you received?

A. Since the time I got hurt?

Q. Yes.

A. I received nothing; I received charity.

Q. From whom? A. I received charity—

(Testimony of Bernard McHugh.)

Mr. ROBERTSON.—(Interrupting.) I object to that as incompetent, irrelevant and immaterial.

A. I received charity— [191]

The COURT.—Wait a minute now. Objection sustained.

Mr. WICKERSHAM.—We want to make an offer, may it please the Court, to show the facts about that.

The COURT.—From whom he received charity?

Mr. WICKERSHAM.—Yes, and how much and why he received it.

The COURT.—I don't think it is material from whom he received it. You can ask him why he received it or about his capacity for labor or anything of that kind, but not the people from whom he received it. I think that is immaterial and irrelevant.

Mr. WICKERSHAM.—But we have witnesses here and we wanted to connect them up with it; that was all.

The COURT.—I don't think it is material.

Mr. WICKERSHAM.—From whom?

The COURT.—Yes.

Q. How have you lived since the time of your injury; since the time you left the hospital?

Mr. ROBERTSON.—We make the same objection to that, if the Court please.

Mr. WICKERSHAM.—What I mean, may it please the Court, is how he has obtained money to live on.

(Testimony of Bernard McHugh.)

Mr. ROBERTSON.—If the Court will pardon me, what difference does it make? Assuming the man was rich instead of poor, as I assume he is, that wouldn't make any difference in the question at issue in this case, as to whether or not the defendant should pay him damages.

The COURT.—Yes, the only question is as to his capacity for labor.

Mr. ROBERTSON.—Yes.

The COURT.—You can question him as to his capacity for labor [192] by reason of the accident. That's all. I don't see the relevancy of the question as to how he lived. He has already stated he lived on charity.

Mr. WICKERSHAM.—Well, we offer to show how he obtained that charity, from whom, to what extent and why he had to take it.

The COURT.—Well, you can show a part of that, but I don't think it is relevant from whom he received it. You can show why his living was contributed to, but not the people. I don't think it is relevant.

Q. Will you state to the jury, then, Mr. McHugh, why you have had to receive contributions or charity from other people?

Mr. ROBERTSON.—We make the same objection.

Q. Since the eighth or ninth day of March, 1922.

Mr. ROBERTSON.—We make the same objection to that, if the Court please.

Mr. WICKERSHAM.—Well, we offer to show—

(Testimony of Bernard McHugh.)

The COURT. (Interrupting.) He man answer.
Mr. ROBERTSON.—Exception, if the Court please.

Q. Go ahead and state why you have had to receive money in that way.

A. I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital, I had only \$28 of my own and the money I received afterwards, of course, I had to borrow it; that I must have in order to live.

Q. Now, Mr. McHugh, let's go back to the time you say this handle, this bail fell on your foot in the hold of the [193] steamer "Latouche." Do you know what caused it to fall?

A. It must have been broken—

Mr. ROBERTSON.—Now, I ask that that question be answered yes or no.

Mr. WICKERSHAM.—I asked him if he knew what caused it to fall.

Q. Did you unloosen it or do anything to loosen it?

The COURT.—Do you know? Answer that yes or no. A. No.

Q. Did anybody else unloosen it? A. No, sir.

Q. Was there anybody around it when it fell—touching it?

(Testimony of Bernard McHugh.)

A. There was nobody touched the bail under any consideration at that time.

Q. Just come over here and show the jury where you were touching the bucket and where the other two men were touching the bucket.

A. I had hold of it right here (indicating).

Q. In the center of the back of the bucket?

A. In the center of the back of the bucket, on the rim.

Q. What were you doing?

A. I was pulling it towards the coal pile, and there was a man on this side and there was a man on that side.

Q. What were they doing?

A. They were pushing—

Q. (Interrupting.) Pushing.

A. Or pulling, I don't know which.

Q. Do you know which part of this bucket was going forward? [194]

A. This here part was going forward.

Q. You were pulling on it? A. Yes, sir.

Q. Now, what was there on that bucket to pull it with?

A. There was not a thing on it, only just a bail, just the bucket. There was no ropes on it or anything.

Q. You're sure about that?

A. There was nothing; only grab hold of the rim of the bucket.

Q. Were there any ropes around it anywhere to pull it by? A. None whatever.

(Testimony of Bernard McHugh.)

Q. Do you know whether there were any handles on it to pull it by? A. Never saw one.

Q. And you don't know anything about this mechanism of this so-called tripper?

A. I don't know anything about that.

Q. Had you ever seen one before? A. No, sir.

Q. Well, do you know where the bucket, the handle of the bucket fell? Do you know what caused it to fall?

A. It must have been broken—

The COURT.—Wait a moment.

Mr. WICKERSHAM.—No; no.

The COURT.—Strike that answer.

Q. I asked you if you knew.

The COURT.—The question is whether you know. Answer that yes or no.

A. I don't know what caused it to fall.

Q. Did it fall? [195]

A. It certainly fell to pieces right quick.

Q. Now, you may state to the jury where it struck you?

A. It struck me on the arch of my left foot and it broke two bones and injured the outside bones of the—

Q. (Interrupting.) What happened then after it fell and struck your foot?

A. Why, some of the men that shovel coal helped me to get up towards the deck, but they never got on dock. The coal extended in front of the winchman down to the floor on a slant and they worked me, helped me out of that and I gets up on

(Testimony of Bernard McHugh.)

deck and I looked around and I didn't seen anybody on the deck, and I started to go on the gang-plank to go on the dock and I saw a man on the dock. He was the first man I saw, and he asked me if I was hurt, and I says, "Yes," and he says, "Why don't you report to the mate?"

Q. Do you know who that was?

A. No, sir; I don't.

Q. What did you do?

A. I told him I didn't know who the mate was and he pointed his hand to a window on the door on the boat and he said, "You go to the door where the light is," and I limps over there and knocks on this door and somebody from the inside said, "What's the matter?" and I says, "I got hurt," and he said, "Well, just because you got hurt you don't need to wake up everybody on the ship."

Q. Well, in the meantime had you seen the mate or anybody in charge?

A. The only one I saw was this man on the dock.

Q. You know who that man was? [196]

A. No, sir.

Q. Don't know whether it was the mate or not?

A. No, sir.

Q. I meant, had anybody been down in the hold at that time except the men at work?

A. There was nobody in the hold except the men that were shoveling coal from the time I went to work.

Q. Did you see the mate down there?

A. No, sir.

(Testimony of Bernard McHugh.)

Q. Did you meet him anywhere from the time you went up to this door? A. No, sir.

Q. Tell us what happened.

A. I woke him up and, of course, he told me he got nothing to do with it. He told me not to wake everybody up on board the ship, and I hops away from there. I stays there for a few minutes squealing and yelling with pain, and I got hold of a lifeboat and I hung on to that for three or four minutes, and I saw somebody coming aboard from the dock, and I hollered out to him and he comes over toward me and he went around to wake somebody else up over on the opposite side of the cabin on the boat and he takes me over to this room, takes me in, wakes the man up. He was a one-armed guy.

Q. The man in the room was a one-armed guy?

A. Yes. There was a safe in it, safe in the room and that man gets a bucket of hot water and I got my foot into this bucket of hot water.

Q. Who was the man that took you to that door?

A. I don't know who he is. [197]

Q. Do you know whether he was the mate or not?

A. No, sir; I don't know.

Q. Well, go ahead then.

A. So they called up the doctor, after I got my foot into this water, in the middle of the night, and they says they got no answer from the doctor when they come back, so they called up a taxi and took me aboard this taxi—

(Testimony of Bernard McHugh.)

Q. (Interrupting.) Who took you aboard the taxi?

A. Why the taxi man come in there and this man that led me to this—

Q. (Interrupting.) How did you get out of this office where you were on this boat?

A. The taxi man helped me out and also the man—I think it was the same man that led me to this room.

Q. You don't know who he was?

A. I don't know the man's name.

Q. Well, go ahead.

A. And they takes me off and put me aboard this taxi and lands me in the hospital.

Q. What time of the night was that?

A. Oh; it must have been around two o'clock; I suppose.

Q. What hospital did you go to?

A. There was only one hospital here that time. The Arthur Yates Hospital.

Q. The Arthur Yates Hospital here on Mission Street? A. Yes, sir.

Q. Was a physician called?

A. Not that night; no. There was no doctor came there until eleven o'clock the next morning.

[198]

Q. What did you do in the meantime?

A. Why, they packed my feet and give me a couple of shots in the arm.

Q. What doctor came to see you the next day?

A. Doctor Story.

(Testimony of Bernard McHugh.)

Q. What did he do for you?

A. He didn't do anything. He just told me to soak my foot two or three times in hot water, as hot as I could stand it.

Q. How long did you continue that treatment?

A. I continued that for nine or ten days.

Q. Then what happened?

A. Then he puts a plaster paris cast on my foot.

Q. Who put the plaster of paris cast on?

A. Doctor Story.

Q. Did you have any other physician during this time except Doctor Story?

A. They took me over to Doctor Ellis' office and he took an X-ray picture, some X-ray pictures of it.

Q. When? A. Before they put the cast on.

Q. Before they put the cast on.

A. I think they took me over twice; yet I am not positive; they took me over once anyway.

Q. They took you over once anyway and he took an X-ray picture of your foot? A. Yes, sir.

Q. Did Doctor Ellis ever give you any treatment of any kind?

A. No, sir; only took those pictures.

Q. Where did you then go, after these X-ray pictures were taken? [199]

A. They took me in a taxi right over to the hospital.

Q. How long did you remain in the hospital?

A. This plaster paris cast was on about three

(Testimony of Bernard McHugh.)

weeks, twenty days. I was in the hospital, all told, 47 days.

Q. Forty-seven days in the hospital.

A. Yes; I was tired there, too.

Q. When did you get out of the hospital, do you remember?

A. I left there the 24th of April.

Q. Where did you go then?

A. I stayed in a rooming-house for about eight or nine days.

Q. What rooming-house?

A. That Jap rooming-house down the other side of the totem pole down there (indicating); shop down below on the ground floor and there's rooms upstairs, and I roomed there.

Q. Now, just tell the jury what has been the condition of your foot from that time to this.

A. Well, the bones that were broken, Doctor Story set and took the cast off, and he told me it would be some time, it would be a matter of time and they will get strong. He never told me there was anything else the matter with my foot.

Q. Well, did your foot get well? Did it cease to pain you?

A. These bones they knitted for quite a while and they hurted and it also hurt as I tried to walk for a long time afterward, and this here (indicating), this first bone, it hurt about here at the arch always during the time I was in the hospital and afterwards, and every time it's hurted considerably

(Testimony of Bernard McHugh.)

more than ever it should be. I think it was broken and I have aches and pains right now.

Mr. WICKERSHAM.—Now, may it please the Court, I am going to [200] examine this witness as much as I can before the doctor gets here, but when he comes I want him to take his shoes off and have him examined, exhibit his foot and I want the doctor present.

Mr. ZEIGLER.—We have no objection.

Q. How long did your foot hurt you since then and to what extent? Just go ahead and tell the jury. How have you got along with that foot since then?

A. It has hurted ever since I got hurt. There has been pain in this foot. If I use it now to any extent, for the last couple of months after or as soon as I get out of bed in the morning, I walk around pretty good, but before I'm on my foot two hours, it starts to ache and pain and it starts to swell up and then when I go along and sit down at night after whatever walking around I do during the daytime—I take my shoe off as a rule. I take my shoe off when I get home, to the cabin, and there is not much swelling there and then I sit there a couple of hours before I go to bed at ten o'clock or half past ten or eleven, whatever time it might be, and it swells after a time; it swells after the exercise that I have done to it during the day and it aches and pains all right along; but this bone here (indicating) and the bones that have been broken at the present time don't hurt any more.

(Testimony of Bernard McHugh.)

They hurt for about four months after I left the hospital and also they were weak at that time. This here bone (indicating) that was injured, there is a growth there and it is growing towards the bone that is next to it on the inside, and it is growing larger all the time and it hurts and pains all the time, and if I get off [201] these main sidewalks or level plank walks or streets—in Ketchikan they are mostly planked all over—and if I get on to where there is rough ground or walk on uneven ground, I'm crippled altogether. I can't make any headway at all. It hurts more when I am on rough ground than when I am on a level walk, because I walk, because I have a level support on my foot on these planks where I haven't when I am on rough ground.

Q. Now, you speak about a growth on your foot. Just describe it to the jury?

A. Well, it has been growing right along. It is growing worse all the time.

Q. Where is it located on the foot?

A. Right on the arch of the foot there.

Q. And on or near any particular bone?

A. It grows on the inside, towards this next bone. Grows in that direction. It also grows up on top—spreads around—large growth.

Q. What condition is that in now? Has it ceased? A. It is still growing larger all the time.

Q. Has it ceased to be painful?

A. It is painful every night and it gets painful

(Testimony of Bernard McHugh.)

whenever I am on my feet two hours in any one day.

Q. Can you work?

A. I cannot. If I could get a job sitting at a desk like that (pointing) I can probably work.

Q. You say you can walk on a level sidewalk for a time?

A. For about two hours in any one day. I have never walked [202] so very far, any more than to come down from the cabin where I live down around the Stedman Hotel and sit down, as I have had to put in most of my time in the winter, and get back and cook and eat and come back there again. I might go down as far as Mrs. Sparhawk's grocery store in Newtown. I have gone down there several times after supper.

Q. What change has this made in your method of work and your occupation as you were able to do before?

A. All I can say about that right now, I'm a cripple at the present time and unable to do any work of any kind such as I have done for the last seventeen years. I can't do it to-day.

Q. Could you mine with your foot in that condition now?

A. No, sir: it would be in everybody's way in the mine.

Q. Could you work in the plumber's trade?

A. No, sir; for I couldn't climb scaffolds or ladders.

(Testimony of Bernard McHugh.)

Q. Now, I ask you, Mr. McHugh, how much of an injury this foot and the accident has been to you? To what extent has it injured you financially?

Mr. ROBERTSON.—Oh, well; now, I object to that.

The COURT.—Yes: objection sustained.

Mr. WICKERSHAM.—We want to show by this witness—

The COURT. (Interrupting.) You can show it, but I don't think your question is in the proper form to show what expense he has been to.

Mr. WICKERSHAM.—Well, I'll renew my offer after we return at two o'clock.

Q. Have you done labor of any kind since you have been injured? [203] A. No, sir.

Q. Is there any work sitting at a desk that you mentioned a while ago that you can do?

A. Well, no; not that I know of.

Q. Have you ever had any education that would fit you for any inside employment?

A. No, sir; I never had anything more than a common school education.

Q. What sort of work have you done all of your life?

A. The first work—

Q. (Interrupting.) Well, in general, similar to what you have already testified to?

A. Well, I have told the nature of the work I have done mostly since I first started to work at the time I was sixteen years old, when I left home.

(Testimony of Bernard McHugh.)

Q. You have never worked in a store or anything like that?

A. No, sir; I never have. I started to learn the plumbing trade when I was sixteen years old.

Q. Have you any other means of making a living except what you have heretofore explained to the jury?

A. No, sir; I have not. I have told the ways—the only way I made a living in the past and that is the only way I know of how to make a living in the future.

Q. Were you paid for what time you were employed on the “Latouche” that night?

A. Yes, sir.

Q. How much were you paid?

A. I don't know how much it was. It was all silver, anyway, [204] from this man with one arm. I don't know his name.

Q. In this room? A. Yes, sir.

Q. And you don't know how much you received?

A. No, sir; I never looked at it. I was suffering too much.

Recess until 2 o'clock P. M. this day, March 27, 1923.

2 o'clock P. M., March 27, 1923.

Court Met Pursuant to Recess.

Testimony of J. H. Mustard, for Plaintiff.

J. H. MUSTARD, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows.

(Testimony of J. H. Mustard.)

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Doctor, you may give the reporter your name?

A. J. H. Mustard.

Q. How old are you, doctor? A. Fifty-three.

Q. What is your occupation or business?

A. Physician.

Q. How long have you been a practicing physician in the Territory of Alaska? A. Since 1905.

Q. Of what school of medicine are you a graduate?

A. Rush Medical School, Chicago, Illinois.

Q. How long have you been practicing medicine since? A. Since 1901.

Q. How many of those years in Alaska, doctor?

A. Since 1905.

Q. Do you know Barney McHugh? [205]

A. Yes, sir.

Q. Have you ever had occasion to treat him for any complaint?

A. He has summoned me from time to time the last ten months or so.

Q. About what?

A. In regard to one of his feet.

Q. When did you have occasion to examine his feet the first time, Doctor?

A. Some time about the middle of May, 1922.

Q. Just state to the jury what you found to be the matter with his feet or foot at that time?

A. Yes. He had sustained some injury to the left foot, and, as a result, two of the metatarsal bones were broken—the second and third—I didn't

Testimony of J. H. Mustard.)

see them when the fracture was recent, but some weeks afterward; but I did see the X-ray plates that Doctor Ellis had taken and the one that he showed me was apparently of this foot.

Q. And from your examination of those plates, what did you discover?

A. That the second and third metatarsal bones were broken.

Q. Just point out to the jury and describe, in common language, what those bones are?

A. This is the injured foot (handling foot of plaintiff). Leading back from the toes at the margin of these toes, there is a long bone similar to the long bone in the hand which goes to unite with a number of other smaller bones forming the flexible joint of the foot near the heel, similar to the wrist in the arm. Now, each of these bones—the extension [206] back from the toes, is called the metatarsal bone. The metatarsal of the big toe is the first one, the one of the second one is the second, and so on. The second and third metatarsal bones are the ones that were broken. They were broken—you will probably later see the plates—near the middle of the bones.

Q. Were you informed about when they were broken?

A. As I recall it, it was about six weeks, or such a matter before I saw Mr. McHugh the first time, in the middle of May, and it was some time in March, was it not—?

Mr. McHUGH.—Yes.

(Testimony of J. H. Mustard.)

Q. When he first came to you?

A. About the middle of May.

Q. How frequently has he been to you in respect to this matter since?

A. Oh, probably an average of every two weeks since then.

Q. When did you examine his foot last?

A. Last night.

Q. Last night. What have you had to do, if anything, with giving him medical attention since May?

A. Practically continuously since then.

Q. Yes. Now, I will ask you, Doctor, if there was any other bone broken than the second and third metatarsal bones?

A. No other, according to the plates I saw; no other bone was broken, but the patient still—

Mr. WOLVERTON.—Well, now, just answer the question.

Q. Go ahead and state the facts if he has pointed out to you, complained about anything.

A. The patient has all the time complained not so much of the [207] two broken bones, but of the first metatarsal, which the plate did not show was broken.

Q. Now, if there is any change in that first metatarsal bone since that time, point it out and tell the jury, what it is.

A. When I first saw him, there was a good deal of inflammation of the lining of the membrane of the first metatarsal—the perosteum—an inflammation that is known as periostitis. This was quite

(Testimony of J. H. Mustard.)

severe and acute and has remained acute and severe for a good many months since that time. More recently it has become subacute and now the condition is what would be described as chronic.

You will notice— I don't know— Can you turn around? I don't know how well you can see his feet, but if you can see them, you can see that there is a definite—

A JUROR.—No.

The WITNESS.—Then the light is no good (raises shade). I think you can see that on the injured foot there is a very definite enlargement at about the junction of the upper and middle thread of the first metatarsal, and that you don't find on an injured foot. Do you see it?

JURORS.—Yes.

The WITNESS.—And on measurement this foot measures half an inch larger at the same point than the right one does. The inflammation that persisted in the periosteum during all those months has resulted in a deposit of bone underneath the periosteum, due to the acute and subacute periostitis that has existed at that place.

Q. Just show the jury where that bone has been deposited.

A. At about the junction of the upper and middle thread of the [208] first metatarsal, a place where you can— It is quite visible, I think.

Q. Is there a deposit of bone on the outside of the other bone?

(Testimony of J. H. Mustard.)

A. The outside of the other bone, but beneath the lining of the membrane of the bone.

Q. What does it resemble—a swelling or—

A. It is newly formed bone.

Q. Newly formed bone?

A. Newly formed bone.

Q. What has been the effect of that deposit upon his health and his condition?

A. Well, it was an inflammation of the periosteum.

Q. That had an effect upon his health and general condition?

A. The deposit came along with the inflammation.

Q. What caused that deposit?

A. The inflammation of the periosteum.

Q. What caused the inflammation?

A. I didn't see the periosteum until— I didn't see Mr. McHugh until after the injury. It was apparently due to the injury.

Q. Apparently due to the same injury that affected the other two bones?

Mr. ROBERTSON.—We object to that as leading.

The COURT.—Objection overruled. He has stated it was due apparently to the injury.

Q. When will he recover from this growth of bone? Will it ever disappear? A. No, sir.

Q. It will remain with him as long as he lives?
[209] A. Yes, sir.

Mr. ROBERTSON.—All very leading questions to a physician.

(Testimony of J. H. Mustard.)

The COURT.—Yes.

Mr. WICKERSHAM.—Well, he is a physician.

The COURT.—Yes. The first question is all proper—when would he recover from it.

Q. Doctor, how often have you seen and examined him since May last?

A. Probably on an average of every two weeks.

Q. Has he been able to work in that time, Doctor?

A. I believe not.

Q. Why?

A. On account of the condition of his foot.

Q. When will he ever be able to work with that foot at such work as he formerly did?

Mr. ROBERTSON.—Well, now, I object to that unless the doctor knows what work this man did.

Q. When will he be able to resume the occupation of mining—working in coal mines, working in the woods and doing heavy, rough work of that kind?

A. That is a difficult thing to answer, Judge Wickersham.

Q. When did you notice that bony growth first coming there, Doctor?

A. When he first came to me there was a pronounced periostitis of the first metatarsal and some swelling there, but at that time I didn't notice any bony deposit.

Q. Point out and tell the jury, as nearly as you can, where that bony deposit is located with respect to the two bones—the first and second metatarsal bones—how nearly it approaches, if at all, to the second metatarsal bone. [210]

(Testimony of J. H. Mustard.)

A. Well, the bones themselves approach fairly closely at the point of the deposit.

Q. May this situation, Doctor, reasonably prevent him from assuming his work for a long time, or may it not?

Mr. ROBERTSON.—Very leading, if the Court please, and no proper foundation laid, and too indefinite.

Mr. ZEIGLER.—Ask him if he can determine the probable duration of the present condition.

The COURT.—Yes; objection sustained.

Q. Can you determine, from an examination of his foot, Doctor, and his present condition when, if ever, it will assume its normal condition so as to permit him to work at his former occupation?

A. As I said before, that is a difficult question to answer. I couldn't set a day. It might be longer and it might be shorter.

Q. What would that depend upon?

A. It will depend upon the disappearance, entirely, of whatever inflammatory process there was there and upon how much inconvenience the bony deposit is going to cause to him later on.

Q. State to the jury how much, if any, stiffness there is in the foot at that place.

A. It is probably less stiff, or more stiff by twenty-five per cent than the other foot.

Q. Can you state to this jury if that will ever be less stiff than it is now?

A. Yes; I think it will be.

(Testimony of J. H. Mustard.)

Q. Can you state to the jury whether or not that bony deposit [211] will ever disappear?

A. It will never disappear.

Q. Well, can you say, then, whether or not the stiffness will not remain?

Mr. ROBERTSON.—Well, now, I object to that, if the Court please.

The COURT.—Simply getting at it around the other way. I think he may answer.

A. There are all sorts of possibilities, but I wouldn't say that it might not disappear, that it might not remain, but I should expect it to disappear.

Q. The bony process? A. No; I mean—

Q. (Interposing.) The stiffness?

A. The stiffness.

Q. And what would cause its disappearance, Doctor, or progress of recovery, to cause its disappearance?

A. In the daily exercise that the foot goes through which will eventually overcome that stiffness.

Q. In time? A. Yes.

Q. What time?

A. That is difficult to answer.

Q. You can't tell that A. No.

Q. Doctor, in your judgment as a physician, has this man really been suffering from this injury to his foot or has he been malingering— [212]

Mr. ROBERTSON.—(Interrupting.) Now, if the Court please, I think that is calling for an answer to a question that it is not within the province

(Testimony of J. H. Mustard.)

of a physician to answer, as to whether or not a man is malingering. It seems to me that that is a question that the jury must answer. Whether or not a man is suffering from an injury is one thing, but whether or not he is malingering, in other words, attempting to deceive is another thing, and a physician can't answer that. That is a question of fact.

The COURT.—He may answer whether in his judgment he has been suffering from the injury to his foot.

Q. Well, I'll put it in that shape—whether, in your judgment as a physician, having examined him frequently, he has been actually suffering from this injury. A. I believe he has.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Doctor, do you recall the first occasion that you examined Mr. McHugh? A. Yes, sir.

Q. Do you have the date?

A. It was about the 15th day of May.

Q. Did you mark it down? A. I did not.

Q. You entered it in your diary? A. Yes.

Q. You have refreshed your memory since on that? [213] A. Yes.

Q. Did you refresh your memory just before you came into the courtroom? A. No.

Q. When was the last time you had occasion to refresh your memory as to the date?

(Testimony of J. H. Mustard.)

A. Oh, I did it last night when Mr. McHugh called my attention to the approximate date.

Q. Was that the first time you ever had occasion to administer, in any way, as a physician, to Mr. McHugh?

A. I think that some months before he had consulted me over some trifling affair. I don't recall what.

Q. Not when he got any injury? A. No, sir.

Q. To his person in any wise? A. No, sir.

Q. Now, Doctor, an injury such as you have now described—a growth on this bone, as I understand it, might that not arise from a number of different ways? A. It might.

Q. Do I understand you to say that the foot is twenty-five per cent stiff? A. Approximately.

Q. Would you say that possibly it was not thirty per cent stiff?

A. I should say the figure is an approximation.

Q. When you say approximately twenty-five per cent would you lower it as low as twenty per cent?

[214]

A. I would.

Q. It might possibly be twenty per cent.

A. It might be.

Q. And exercise would remedy that condition?

A. We would expect it to.

Q. Exercise of the foot. A. Yes, sir.

Q. In other words, Doctor, what do you mean by "exercise"?

(Testimony of J. H. Mustard.)

A. The daily exercise that the foot goes through in going around as we go around every day.

Q. Ordinary use of the foot?

A. I don't mean any specially devised exercise.

Q. You mean, the ordinary use of the foot would tend, in this case, to better it? A. Yes.

Q. In other words—while I am not speaking in medical terms—the foot, if a man sits still and doesn't use the foot at all, it might be that the stiffness would increase in percentage instead of decrease? A. It would.

Q. And it would be more likely to increase if he didn't use it than it would if he made use of it, is that not correct? A. Correct.

Q. Now, would you say that the foot incapacitated him from working as a plumber?

A. If there is any heavy work in plumbing, I should say it would. It wouldn't incapacitate him from collecting.

Q. You mean collecting as plumber? [215]

A. Yes.

Q. Would it incapacitate him from operating a plumbing business?

A. I don't know enough about the work. As I said before, if it is hard physical work, taking a great deal of strain on the feet, it would.

Q. You didn't raise that objection when you were asked about mining?

A. I know enough about mining to know that you couldn't do mining. I have lived a good many

(Testimony of J. H. Mustard.)

years in a mining country and I have never lived with a plumbing outfit.

Q. However, you have more or less occasion to know what plumbers do, don't you?

A. No, I haven't. They have never done anything to me.

Q. Now, do I understand you to say that since May fifth— Was that the date?

A. About the 15th.

Q. About the 15th of May. That since that time you have had occasion to examine Barney's foot once every two weeks? That is, approximately.

A. I didn't say so. I said it would be an average of about once every two weeks.

Q. An average of once about every two weeks?

A. Yes, sir.

Q. During that time the foot has gradually grown worse, has it not?

A. I said quite the reverse, if I said anything.

Q. It has been growing better?

A. Been growing better. [216]

Q. During that time to what extent has it grown better?

A. Considerably better than it was the first time I saw him. At that time he was hardly able to hop along.

Q. Could you fix it by percentage or approximation?

A. I hadn't thought of it along the line of percentages, but it is certainly a good fifty per cent better than it was then.

(Testimony of J. H. Mustard.)

Q. At least fifty per cent better than it was when you first examined it on or about May 15th?

A. Yes, sir.

Q. Is a deposit of bone, or growth of bone, as you have described in a case of this kind unusual or a usual occurrence?

A. I don't understand what you mean by a "case of this kind."

Q. In a case where you have seen the foot, I mean, is such a growth or deposit of bone as you have described, that Barney now has, this bone on his foot, is that unusual or usual?

A. Where an inflammation of the periosteum persists, answering your question—I am not certain what you are asking—but answering a part of your question, wherever an inflammation of the periosteum persists for any length of time, there will be a deposit of bone underneath the periosteum.

Q. There will be.

A. Now, answering what may or may not have been your question, I will say that it is, fortunately, not the rule, in an accident of this kind, for an unbroken bone to be injured in such a way as to set up this periostitis and deposit that bone.

Q. Will a growth weaken his foot?

A. Of bone? [217]

Q. Will a growth such as this weaken his foot?

A. Not unless inside of these injuries there may be a bony tumor which would weaken the foot, but in a case of this kind, just a deposit of bone, the foot is not weakened by it.

(Testimony of J. H. Mustard.)

Q. The foot is not weakened by it? A. No, sir.

Q. In the case of a fracture of this kind or a broken bone, Doctor, is it usual or unusual for the foot to enlarge? As I understood you to say, in this case, his left foot is enlarged practically one-half inch more than the right foot. Is that a usual or unusual occurrence?

A. Shortly after, during the time the bones are uniting and for some months afterwards, there will be a swelling of the parts affected.

Q. And that eventually recedes, does it not?

A. After some months we can expect that swelling to disappear.

Q. Is that swelling a part of nature's process of healing the wound?

A. No; the swelling is not. The swelling is due to the lessened tone of the soft tissues surrounding the broken bone and the blood serum more readily makes its escape into it and produces the swelling, because of the disuse of the soft tissues.

Q. Because of the disuse? A. Yes.

Q. The swelling of itself is of no particular importance, is it? That is to say, we get a swelling from a blow on our arm, or various things of that kind. The swelling of itself is [218] not of any great importance in this matter?

A. In this matter?

Q. Yes, sir.

A. The swelling has practically disappeared.

Q. The swelling has practically disappeared?

(Testimony of J. H. Mustard.)

A. Yes.

Q. And will eventually disappear entirely?

A. Yes, sir; I expect.

Q. In other words, the half-inch swelling that you have described at the present time is simply a temporary condition, is it not?

A. I didn't say what the half-inch enlargement was due to. I called attention to the enlargement. I never mentioned anything about the swelling at all.

Q. There is no swelling now?

A. As I said before, the swelling has very largely disappeared.

Mr. ROBERTSON.—I think that's all.

The COURT.—Doctor, is it unusual for a man's left foot to be of a different size from the right foot, or the right foot to be of a different size from the left foot?

The WITNESS.—It is very rare that you will find organs of the body that are symmetrical in every respect.

The COURT.—Then this half-inch difference in the size of the two feet might not necessarily occur from this injury?

The WITNESS.—On the other hand, your Honor, there is this definite enlargement of the first metatarsal bone, which is visible, that is not present in the other one.

The COURT.—That's all. [219]

Q. (By Mr. ROBERTSON.) For instance, Doctor Mustard, assuming that you break your wrist

(Testimony of J. H. Mustard.)

and it heals up, even if it is healed and the fractured bone cured completely, isn't that wrist enlarged somewhat by the very fact of its healing up?

A. Wherever a bone is broken, rather, it is the rule with a broken bone, that in the process of healing an excess of callous is thrown out and consequently the bone is almost invariably larger at the point of fracture than it was before.

Q. After it is healed? A. Yes, sir.

Mr. ROBERTSON.—That's all.

Redirect Examination.

(By Judge WICKERSHAM.)

Q. I will ask you if the enlargement which you have pointed out there, on the first metatarsal, next to the second metatarsal bone on his foot, was the result of a fracture of the bone there?

A. There was no fracture of that bone as shown by the X-ray plates.

Q. It was produced as you have already stated?

A. Yes, sir.

(At this point witness replaced shoe on injured foot.)

Testimony of Barnard McHugh, for Plaintiff.

Direct Examination of BARNARD McHUGH Resumed.

(By Mr. WICKERSHAM.)

Q. Barney, I will ask you this question: What have been the expenses of your sickness since the ninth of March last up to date?

A. About \$470.

(Testimony of Barnard McHugh.)

Q. And you say your mother is living?

A. Yes, sir. [220]

Mr. WICKERSHAM.—I want you to ask the witness how much money he has sent to his mother each year prior to that time and how much since.

Mr. ROBERTSON.—Well, now, if the Court please, I object to that as incompetent, irrelevant and immaterial. That is directly appealing to the prejudice and sympathy of the jury. It has nothing to do with this case.

The COURT.—Do you object?

Mr. ROBERTSON.—Yes, your Honor.

The COURT.—Objection sustained.

Mr. WICKERSHAM.—We desire at some time to make that offer in the record.

The COURT.—You can make your offer now.

Mr. WICKERSHAM.—Well, we offer to show that this man's mother is alive, that she is about seventy years old; that she depends entirely upon him for her support, that formerly he has sent her from four to five hundred dollars per annum and that since his injury he has been unable to send her anything.

The COURT.—Offer denied.

Mr. WICKERSHAM.—We take an exception.

Mr. ROBERTSON.—And I will ask the Court that the jury be instructed that so far as the statement of counsel is concerned they cannot accept that as any evidence in the case.

The COURT.—The jury will not consider the statement of counsel at all. It is not any evidence

(Testimony of Barnard McHugh.)

in the case. The Court holds that it is entirely irrelevant.

Mr. WICKERSHAM.—To which we take an exception. [221]

Mr. WICKERSHAM.—That's all. ,

Cross-examination.

(By Mr. ROBERTSON.)

Q. Barney, this noon, when you left the courthouse and went downtown you walked down this street (indicating) here, did you not?

Mr. WICKERSHAM.—I object to counsel's testifying, may it please the Court.

The COURT.—He may answer the question. Objection overruled.

A. I certainly went in front of that door and I went in the center of the street and I walked up in the automobile tire track. Did you expect me to—

The COURT. (Interrupting.) Now, wait a minute.

Mr. ROBERTSON.—Just answer the question.

Q. You followed down the rocky street, did you not?

A. I walked in the automobile tire track, in the center of the street where there was no rock and I took good care not to step on any. I was careful where I set my foot, because I have got good sight to see the street.

Q. You do have good sight?

A. I have got good sight.

(Testimony of Barnard McHugh.)

Q. And you always have had good sight, have you not?

A. Always have.

Q. You did walk down the street though, down the rocky street.

A. I prefer the center of the street rather than to walk on the slippery sidewalk.

The COURT.—He asked you if you walked down the street.

A. I certainly did. [222]

Q. Now, Barney, you say you have been put to an expense of \$470, as I understand it?

A. Yes, sir.

Q. Didn't the defendant pay your hospital bill?

A. I suppose so; I didn't pay it.

Q. Pardon me.

A. I didn't pay it.

Q. Did not the defendant also pay the doctor bill, the bill of the doctors—Doctor Story and Doctor Ellis? A. I suppose they did.

Q. You were not obliged to pay either the hospital bill or the bills of Doctor Story or Doctor Ellis? A. No, sir; I was never asked to.

Q. Now, you told us this morning, in quite a little detail, just where you worked during the past number of years; in fact, since you came from Seattle and before you came from Seattle. Was there any other place where you worked during that period?

A. You mean since I came to Alaska?

Q. Yes, sir.

(Testimony of Barnard McHugh.)

A. Yes; there was one place where I went to work, but I didn't remain for any length of time at that place.

Q. Then the places you named didn't include all the places where you worked? A. No, sir.

Q. Do you recall any other places where you worked?

A. Yes, sir; I went to work up at the Gypsum mine out of Juneau. I went out on one boat and worked four hours and [223] walked away without pay. I didn't like the work; and I also went out here, in 1921, about a week before Christmas, I went out to the Rush & Brown mine and they put me to work sorting ore, and I didn't know anything about it and threw away a lot of good rock. I didn't know ore from waste; so I didn't suit them, and I was there between—the boat goes out there and back every week. I worked four days and I was "fired." He claims I got more ore out on the dump, out on the waste, than I put down in the ore bin.

Q. Now, Barney, as I understand you, you were engaged in the plumbing business at Hyder for for something like, I think you said over a year?

A. I was engaged—I was at Hyder that time, but I wasn't engaged in the plumbing business at Hyder for that length of time.

Q. You were a plumber there for that length of time?

A. No, sir; I went to work there first as a mucker. I said so this morning.

Q. I thought that was the second time you were

(Testimony of Barnard McHugh.)

back. I thought it was when you first came up into Alaska from Seattle?

A. There was no such work going on at Hyder when I first came up in 1916. There was no work of that kind that I know of at all.

Q. How long have you been engaged during your life as a plumber?

A. I worked eleven years in the States as a plumber before I came to Alaska and about three years in England and Ireland.

Q. As a master plumber?

A. I had a shop in Seattle for about 18 months and also in Vancouver for two years and nine months. [224]

Q. As a master plumber? A. No, sir.

Q. Did you do the work of a master plumber?

A. I certainly did.

Q. Handle tools?

A. All kinds of tools handled by any plumber during the years that I worked at the trade.

Q. Did you actually ever do any plumbing jobs?

A. I certainly did.

Q. Did you do considerable work around them?

A. Yes.

Q. Handle wrenches and pipes, and so forth?

A. Yes, sir.

Q. Now, you worked at one time out in Hocky Pass for a logging outfit? A. Yes, sir.

Q. What were you doing there with that logging outfit?

(Testimony of Barnard McHugh.)

A. I bucked wood and split wood and fired the donkey while the donkey was running.

Q. Fired a donkey engine? A. Yes, sir.

Q. How long did you work around the donkey engine?

A. During the time I worked there, of course, the donkey engine didn't work every day.

Q. About how long?

A. Oh, I suppose about four days a week; five days a week.

Q. And you fired the donkey engine?

A. Yes, sir.

Q. During that time, did you run the engine?

[225] A. No, sir; there was an engineer there.

Q. You were helping the engineer?

A. I was firing. The engineer doesn't do any more than just to steer the engine.

Q. Now, then, how were you getting paid for that, by the week or by the month?

A. I was getting paid six dollars for eight hours.

Q. While you were out in the woods?

A. Either in the woods or at the donkey.

Q. But, when you are out at a logging camp, you don't get your pay unless you put in a day's work? A. You work eight hours for your pay.

Q. Yes, sir. And if some particular day you didn't work, you didn't get paid?

A. We worked every day while I was there.

Q. You did work every day.

A. I worked overtime afterward very often and I also got paid for that.

(Testimony of Barnard McHugh.)

Q. Now, during 1921, from January 1, 1921, to December 31, 1921, how much in wages did you earn?

A. January, 1921, I was working at the Premier Mine as a plumber.

Q. How much wages did you earn during that year, the year 1921, the entire year?

A. Well, that I can't very well tell you.

Q. You don't know how much?

A. In 1921, in January, 1921, I got \$7.50 a day for eight hours.

Q. How long did you work?

A. I worked from—I went to work—I worked from January till the last of May.

Q. Did you get in every shift? [226]

A. Got in every shift and lots of overtime. I put in two shifts—I got double shift for one day very often.

Q. How much did you earn?

A. I averaged over \$207 a month clear and my board.

Q. For how many months?

A. From January till the eleventh of May. I was scarcely below \$200 in any one of those months.

Q. For a little over four months, is that right?

A. Yes, sir.

Q. Now, then what did you do after that?

A. Well, sir, I stayed there at Hyder for about two or three weeks and worked again for about two weeks.

(Testimony of Barnard McHugh.)

Q. Where were you working during those first two or three weeks after that?

A. I come down to Hyder the eleventh of May and I laid off for three weeks at the time.

Q. You laid off for three weeks? A. Yes, sir.

Q. Did you earn any money during that three weeks? A. I was taking a rest.

Q. You were taking a rest. A. Yes.

Q. Then, what did you do after that?

A. I went to work again.

Q. Where did you work then?

A. I worked on the road, shoveling gravel.

Q. At Hyder? A. Up from Hyder.

Q. How many days did you put in on that?

A. Oh, just about five weeks, I guess. [227]

Q. What did you get paid at that?

A. I got \$4.75 a day.

Q. Did you put in every day? A. Yes, sir.

Q. Sundays? A. Yes, sir.

Q. Then what did you do after that?

A. I quit the job.

Q. Then, where did you go?

A. I went up to Anchorage, to the coal mines.

Q. Did you come to Ketchikan first?

A. Yes, sir.

Q. Did you rest around Ketchikan for a while?

A. Stayed around here for a week or two—not quite two weeks.

Q. You say you started to go into Mayo?

A. Yes, sir.

(Testimony of Barnard McHugh.)

Q. And you got up to Skagway and got off the boat there, is that right? A. Yes.

Q. How long did you rest at Skagway?

A. I stayed there until I got a boat to take me back to Juneau; then I got the boat, another boat, and went westward.

Q. How long were you in Skagway?

A. Oh, I was there about, there several days.

Q. Nearly a week?

A. About a week, I guess.

Q. How long were you in Juneau?

A. Three or four days. [228]

Q. And then you went over to Anchorage?

A. Yes, sir.

Q. How long were you in Anchorage before you went to work?

A. I was there four or five days.

Q. And then where did you go to work?

A. The Anchorage coal mines.

Q. At what?

A. At the Anchorage coal mines.

Q. How long did you work there?

A. I worked there until about the last days of November.

Q. What time did you go to work?

A. I went to work some time in August, the first of August, I guess.

Q. You worked from the first of August?

A. About. It might be the tenth, ninth or tenth of August the time I went to work. I don't know exactly to a day or two days.

(Testimony of Barnard McHugh.)

Q. About the ninth or tenth of August?

A. Yes, sir.

Q. Up to what time in November?

A. Up to the last days of November.

Q. You think it was past Thanksgiving time or before?

A. Last days of November when the mines shut down.

Q. Then, where did you work the rest of the year?

A. I came down here to Ketchikan and I went to Hyder and stayed there for about two weeks.

Q. What time did you get back to Hyder?

A. Oh, I got back about, around the 20th of December.

Q. Just before Christmas? [229]

A. Yes, sir.

Q. Just before Christmas.

A. Yes; I got back to Hyder earlier than that. I come direct that time. I was only here one night.

Q. How long did you rest over in Hyder?

A. I didn't work there at all.

Q. You didn't work there at all? A. No, sir.

Q. So during the year 1921, the three places you worked were at the Premier mine, then on the road at Hyder and then up at the coal mines, some place near Anchorage, is that correct, Mr. McHugh?

A. Yes, sir.

Q. Did you earn over a thousand dollars that year? A. Yes, sir; I did.

Q. Did you make an income tax report?

(Testimony of Barnard McHugh.)

Mr. WICKERSHAM.—We object, may it please the Court. This is immaterial and irrelevant.

A. There was no—

Mr. WICKERSHAM. (Interrupting.) Wait a moment. That has nothing to do with this case.

The COURT.—Well, he is testing him as to whether he made out an income tax return. He may answer.

Mr. WICKERSHAM.—That includes part of the testimony we were trying to get in. I wanted to ask him how much money he had been sending his mother and the Court wouldn't allow it.

The COURT.—Which?

Judge WICKERSHAM.—What he expended in supporting his family.

The COURT.—Then you can explain it in that way. [230]

Mr. ROBERTSON.—All right. I withdraw the question.

Q. Now, Barney, what work did you do during 1920, from January 1, 1920, to December 31, 1920 the preceding year—the year just before the one you have just told us about?

A. I worked on the road out from Juneau in the winter time.

Q. What time did you go to work for the Alaska Road Commission?

A. I went to work there sometime in December. I know I was there at Christmas time anyway, and I worked there till some time in the middle of March

(Testimony of Barnard McHugh.)

I came down to Ketchikan to go out to Hyder in the spring of 1920.

Q. Then you worked continuously starting sometime in December, 1919, down to March, 1920, for the Road Commission. A. Yes, sir.

Q. Out of Juneau? A. Yes, sir.

Q. What page did you get there?

A. Four dollars and board.

Q. Whereabouts were you working?

A. We were working out at that rock cut, if you have ever been out there.

Q. Whereabouts?

A. Way out as you go towards the glacier. I was out past that cannery—two canneries belonging to—oh, I forget.

Q. You were out to the Auk Ban cannery?

A. This side of the first cannery. There was a rock cut there.

Q. On this side of the lake?

A. This side of the cannery.

Q. Between the lake and the cannery?

A. About this distance from here to the Stedman Hotel from the [231] first cannery where we worked.

Q. Where did you go to work after you left there? A. At Hyder.

Q. Now, then, when you were out on the road, for the Road Commission, did you work every day?

A. Every day; yes, sir.

Q. Then you came into town and laid off?

A. Yes, sir.

(Testimony of Barnard McHugh.)

Q. You are sure of that? A. Yes, sir.

Q. And you put in every day? A. Yes, sir.

Q. Sundays included? A. Yes, sir.

Q. Now, when you came down to Hyder, how long did you rest before you went to work?

A. I was in Hyder about eight days.

Q. How long did you rest in Juneau before you came down to Hyder? A. About a week.

Q. Then you came from Juneau down to Ketchikan? A. Yes, sir.

Q. How long did you rest here?

A. I must have been here about two weeks.

Q. About two weeks.

A. Might be a few days more.

Q. A little over two weeks? A. Just about.

Q. Well, I mean about two weeks or so?

A. Probably so. [232]

Q. Well, then you went over to Hyder. How long did you rest before you went to work there?

A. Eight days.

Q. Well, altogether, you were idle about a month; is that it? A. Just about.

Q. You went to work down in Hyder sometime in April; is that correct? A. Yes, sir.

Q. How long did you work there then?

A. I worked from there— I went to work at the Premier Mine and I worked from that time on, until the eleventh of May next year, 1920, or 1921.

Q. Is that when you did part of the plumbing in the superintendent's house? A. Yes, sir.

(Testimony of Barnard McHugh.)

Q. Now, then, Barney, you remember making out this complaint in this case? A. Yes, sir.

Q. Where was it you signed the complaint?
Where were you when you signed the complaint?

A. Ketchikan.

Q. Whereabouts in Ketchikan?

A. I don't really know. I can't say as to that.

Q. Don't you remember where you were in Ketchikan when you signed the complaint, what building? A. I was up in jail, this federal jail.

Q. You were in jail? A. Yes, sir.

Q. Now, Barney, did you get on a spree shortly after you came [233] out of the hospital?

A. No, sir.

Q. You weren't on a spree for some time shortly after you got out of the hospital? A. No, sir.

Q. You are sure of that? A. I'm positive.

Q. You don't drink? A. Once in a while.

Q. You don't drink except very infrequently?

A. No, sir.

Q. And you are not accustomed to going on sprees? A. No, sir.

Q. How did you happen to be in jail that time?

A. I was found guilty of bootlegging.

Q. Found guilty of bootlegging.

A. Or, in other words, for having beer in my possession.

Q. But you don't drink yourself except very infrequently?

A. Why, yes, I take a drink once in a while.

Q. You do take a drink once in a while?

(Testimony of Barnard McHugh.)

A. Yes, sir.

Q. Well, do you mean that you don't get on a spree frequently?

A. I haven't in eighteen months, anyhow. I haven't in pretty near, not quite pretty near two years.

Q. You are sure you didn't just shortly after you got out of the hospital?

A. No, sir; because I had no money.

Q. Because you had no money.

A. To go on a spree.

Q. That was the thing that kept you from it—a lack of funds? [234] A. I had no funds.

Q. I see. I think you told us this morning that it was pretty hard work climbing around in this town, with so many steps about the town.

A. I don't know that I answered any question like that this morning.

Q. Well, it's pretty hard work for you to go up and down steps here?

A. It is harder for me to go up or down, than it is to come up; that is, it affects me more. I can make it up easier, but I don't say that I can travel a flight of stairs that is so awfully high. It is really more easier and more comfortable for me to go up a stairway than to come down with the way my foot is—the way it affects me.

Q. You don't find it very difficult, then, to come up steps, as a matter of fact? A. Well, yes.

Q. Or to go down either?

A. It affects me to go down.

(Testimony of Barnard McHugh.)

Q. It affects you to go down.

A. It affects my left foot. I haven't got the use of my foot that I ought to have. I have got to use my foot sideways.

Q. You walk down sideways? A. Yes, sir.

Q. Well, now, do you know a man by the name of Mons Halsor? A. Halsor?

Q. Yes.

A. I might know the man. There's a man in this town, I know, that I don't know the name. [235]

Q. Don't you remember a man by the name of Mons?

A. No, sir; I might know the man, but I never heard that name before.

Q. Don't you know that man sitting back next to the window, the open window (pointing)?

A. I know that man, but I never did know his name. I never heard his name mentioned.

Mr. ROBERTSON.—(To man in courtroom.) There, stand up.

Q. You say you didn't know his name?

A. The only name I heard is Ole, but his last name I don't know.

Q. Well, Barney, let it go at that. You go out to Ole's house quite frequently? A. Well, no, sir.

Q. Well, you used to? A. No, sir.

Q. Didn't you, when you first got out of the hospital, didn't you go out to Ole's house or cabin quite a bit? A. No, sir; never been to his house.

Q. Never been there? A. No, sir.

Q. Never have? A. No, sir.

(Testimony of Barnard McHugh.)

Q. You do know where he lives? A. I do not.

Q. Did you know where he lived when you got out of the hospital? A. No, sir.

Q. Have you ever known where he lived?

A. No, sir; I can't say that I do. [236]

Q. Whereabouts was it you lived?

A. I live at the present time up on Mahoney Heights.

Q. Where is that—across the creek?

A. As you go out towards the New England Fish Company; it's to the left of the road as you go out to the fish company.

Q. As you go down towards the New England Fish Company's plant, it's that place that branches off up to the left? A. Yes, sir.

Q. A little distance this side of the New England Fish Company's place?

A. Yes; there is a street that goes up there on the hill. I live in one of those houses.

Q. And you deal down at Sparhawk's for your groceries? A. No, sir.

Q. What place do you deal?

A. I don't deal in any store in Newtown.

Q. You go down there, don't you?

A. I have gone down there off and on, after supper, on different occasions. I go down to see a friend that lives down there by the name of William B——.

Q. You go down there to see Mr. B——.

A. Yes, sir; and very often he goes up to my house.

(Testimony of Barnard McHugh.)

Q. How frequently do you go down to Newtown?

A. Oh, maybe every night after supper.

Q. Every night after supper?

A. Or, I might go down there in the middle of the day, sometimes.

Q. Do you go down as much as twice a day?
[237]

A. No, sir; I scarcely ever go down there more than once. Well, yes; I have gone down there some days more than once.

Q. And you went to work on March eighth, unloading coal on the "Latouche"? A. Yes, sir.

Q. And you worked from then on until midnight?

A. Yes, sir; I worked till twelve.

Q. And you got along all right in your work, did you, Barney?

A. Nobody ever said nothing to me.

Q. Well, did you find considerable difficulty in catching on to the work? A. No, sir.

Q. You didn't? A. No, sir.

Q. You worked, after you got through at twelve o'clock, you got your lunch and went back again at one o'clock? A. Yes; I went back to work at one.

Q. That would be one o'clock in the morning, early in the morning of March ninth, would it not?

A. Yes, sir.

Q. It was shortly after that, I understood you to say, that you hurt your foot? A. Yes, sir.

Q. How many men were shoveling coal into the bucket with you? A. Two men besides myself.

(Testimony of Barnard McHugh.)

Q. Two men besides yourself. Was it that two from seven o'clock to twelve o'clock?

A. Yes, sir.

Q. Was that the two from one o'clock on until the time you got hurt? [238] A. Yes, sir.

Q. And about how long did it take the three of you to load a bucket of coal?

A. Oh, probably five or six minutes. I don't really know. I didn't have no watch and I never timed how long it took me.

Q. Is that about what you estimate—about five or six minutes—to load up one bucket, or tub of coal, I mean? A. Yes.

Q. And between seven and twelve o'clock, when you first went down at seven o'clock, Barney, do you recall all the men that were working down in the hold at that time?

A. There was eight men down in the hold at seven o'clock in the evening, as I went down. I made nine as I got there.

Q. Where was Mr. Pauzi, the longshore boss?

A. Mr. Pauzi, he was on the dock.

Q. He was on the dock?

A. I met him on the gang-plank. You see, he hired me about three o'clock in the afternoon, three or four. He hired me about four hours previous to the time I went to work. He asked me to be back at seven because there were men at work then and they would go to supper at six o'clock and then go off shift and he hired me to go on at seven.

(Testimony of Barnard McHugh.)

Q. You made arrangements about what pay you were going to get?

A. I never asked him about the pay.

Q. He told you you were going to get paid, didn't he? A. Yes, sir.

Q. Did he tell you how much? [239]

A. He hired another man—there was some man he hired just before me. He hired all the men, and I overheard one of them ask him how much they paid an hour on board the boat and he said six bits.

Q. And you understood that you were going to get six bits an hour; is that correct? A. Yes, sir.

Q. Now, of these other eight men, which one of those was boss over you? A. None of them.

Q. None of those men was boss over you at all?

A. No, sir.

Q. And you were all simply working together, is that it? A. No, sir; no.

Q. Well, three of you. There were three tubs and three men on each tub, is that it? A. Yes, sir.

Q. There was none of the men who was boss down there?

A. There was nobody from any of the other buckets tormented us and no one never tormented the rest of them.

Q. You went down and picked out your tub and went to work at seven o'clock?

A. No, sir; I did not.

Q. What did you do?

A. I went down to the tub that there was two men working on.

(Testimony of Barnard McHugh.)

Q. You went down to the tub that there were two men working on.

A. Yes, sir; and I could see a shovel laying there. That was [240] the first thing I asked about as I got down aboard the boat. I knew what we were to do, what I was hired for. I was looking for this shovel and it was laying right alongside, close to the bucket that these two men were shoveling coal into, so I picks it up and I began to figure that that was the bucket I was supposed to work with, where these two men were working.

Q. Was that correct?

A. Yes; that was the place I went to work.

Q. And you fell to work immediately, didn't you?

A. I went to work right there.

Q. And you didn't stop to make any examination of the tub, did you? A. No, sir.

Q. You didn't make any examination of the tub at all? A. No, sir.

Q. You just went right to work? A. Yes, sir.

Q. You worked with the tub from that time on until twelve o'clock at midnight? A. Yes, sir.

Q. I see. And during that time, about how many tons of coal did you, you and your two men that were helping you—and, of course, you were also helping them—how many tons of coal do you suppose you three men got out during that time?

A. I can't tell you.

Q. Do you think that during that time you filled up the tubs at about the rate of a tub every five or six minutes, something like that? [241]

(Testimony of Barnard McHugh.)

A. Well, I suppose it would take between ten and fifteen minutes to make the trip. Of course, if we loaded the bucket in five or six minutes, it would possibly take that much or longer to make the trip up to the hopper and back.

Q. What would you do while the tub was being hoisted up the hopper and before it was returned to you? A. Either stand up or sit down.

Q. During that time you just simply stood and waited until your tub got back? A. Yes, sir.

Q. That is you worked on a particular tub that was your tub to work on, and you kept working on it? A. Yes, sir.

Q. Now, then, whereabouts were you working before you went off shift to go to supper at twelve o'clock—what part of the boat, I mean to say? Were you working amidships? A. Yes, sir.

Q. You were working right in the center?

A. I was in the center, on the starboard side, opposite from the dock. The boat was heading up that way (indicating).

Q. The boat was headed down the channel?

A. In fact, the winchman was facing towards the channel and I was working at his right hand.

Q. When you went back after one o'clock, did you go to the same place? A. Yes, sir.

Q. When you laid off to go and get your supper, where did you leave your tub?

A. Our tub was loaded with coal. [242]

Q. Your tub was loaded with coal?

A. Before we went to supper; yes.

(Testimony of Barnard McHugh.)

Q. Then, when you got—

A. (Interrupting.) It just happened that way. One of the other buckets was hoisting at the time.

Q. When you got back, what did you first do— send that tub up then? A. Yes, sir.

Q. And you hitched the hook on the eye that sticks up above the bail, did you not?

A. Yes, sir.

Q. And in getting the loaded tub out, Barney, would they pull the tub out with the tackle, or would you men take the loaded tub and pull it out?

A. The only thing that we did to it was to hook the hook on.

Q. The only thing that you did was to hook the hook on, and then the winchman would operate the tackle and pull the tub out, is that correct?

A. Oh, he hoisted it right up. It would skid along the floor you see, for a few feet and finally it would raise right up.

Q. And when it was pulled out that way was the bail lying over this way; that is, the handle, this iron part here (indicating), was up here. Is that it?

A. The bail stood directly up at all times while I was working there. It was never lowered toward the floor of the deck.

Q. Even when they were pulling on it, it stood right there?

A. Well, it might move a few inches over from perpendicular, up and down with the force of the pulling. [243]

(Testimony of Barnard McHugh.)

Q. But otherwise it stayed right there?

A. Yes, sir.

Q. Now, the bail, you could put the bail either way, either over this way (indicating) or over that way, towards the lip, couldn't you?

A. That I couldn't answer.

Q. You don't remember that you could take the bail and put it that way or this way?

A. No, sir, I don't know.

Q. You don't know whether they could pull it over toward the lip or not? A. No, sir.

Q. You know they could pull it over this way (showing)?

A. I didn't know at that time, not before it dropped and hit me on the foot, as I never worked with one before. I never worked aboard ship, so I never shoveled coal into a coal bucket.

Q. You never shoveled coal into a coal bucket?

A. No, sir.

Q. And you didn't look at the tub at all?

A. No, sir; I never examined it.

Q. Didn't make any examination? A. No, sir.

Q. And didn't ask the men about the tub?

A. No, sir; nobody ever told me anything about it.

Q. Didn't say anything about it? A. No, sir.

Q. Just simply went to work and commenced to shovel coal? A. Yes, sir.

Q. Now, then, when you got hurt, Barney, you had your left [244] hand, I understood you to say, right on the back rim of the tub, is that correct?

(Testimony of Barnard McHugh.)

A. Yes, sir.

Q. And where were you standing?

A. I was standing at the back, pulling.

Q. You were standing back down in here (indicating) some place, is that it? A. Yes.

Q. And you were pulling on the tub?

A. Yes, sir.

Q. Where was the Indian boy and that other white man?

A. There was one on each side of me.

Q. One of them on either side of you?

A. Uh-huh; on the sides.

Q. You didn't have your right hand pulling on the tub? A. No, sir; I had my left hand.

Q. Just pulling with one hand? A. Uh-huh.

Q. Do you know whether the other two men were standing close to the back, or were they standing up that way alongside of the tub?

A. They must have been on this side; yet I don't know. The only thing I can tell you is that there was one on each side of me.

Q. Barney, how did you happen to get your hand out of the way of the bail when it fell?

A. The bail hit me right here (showing).

Q. The bail hit you right there close to the shoulder? A. Close to the shoulder. [245]

Q. Before it hit your foot?

A. Yes, sir; it skinned me right there (pointing).

Q. Took the skin off?

A. The skin was off for two weeks.

(Testimony of Barnard McHugh.)

Q. Then you were leaning with your left arm clear over on to the tub, weren't you?

A. I had hold of the rim of the bucket.

Q. I see.

A. Pulling on it. That's all I know.

Q. That's all you know—that you were leaning over on it. Were you leaning on it—did you have your hand outstretched this way (illustrating)?

A. No; I wasn't leaning on it; I was pulling on it.

Q. I mean, were you pulling with your arm outstretched or were you up close, leaning your shoulder on it at the time?

A. I might have been turning it. We turned the bucket as we pulled it in order to get it at the proper place and the proper position, and I believe at the time that I was turning it—trying to pull it in that direction.

Q. You were turning it at that time?

A. I might have been.

Q. You are not sure about that? A. No, sir.

Q. And you didn't look the tub over at all, make any examination of it before that time, did you?

A. No, sir; I never looked at it.

Q. And you don't know what was attached to the tub whatever, do you? [246]

A. I never saw nothing attached to it, only the bail.

Q. Did you examine the tub to see what it was like? A. No, sir.

Q. You didn't? A. Never did.

(Testimony of Barnard McHugh.)

Q. You knew the handle was on the tub?

A. I saw the bail.

Q. That's all you know about the tub itself, is that correct?

A. That's all I know about it; yes.

Q. You knew it had wheels, didn't you?

A. Yes.

Q. How did you see this wheel down here (pointing), on the back?

A. The wheel on the back extends past the bucket for about, probably, a half an inch. It was there so that it could be easily seen.

Q. This wheel on the back extended out about a half an inch and you could see it very easily down close to the floor?

A. Yes, sir; you could. You could easily, more easily, I think, than those at the front.

Q. Do you think it was more than a half an inch that it stuck out?

A. Might be two inches for all I know. It seemed to extend out across the bucket.

Q. You think it stuck out a little bit?

A. Yes; it seemed that way.

Q. How far did the wheels on the front stick out? A. That I don't know.

Q. You saw the two wheels on the front? [247]

A. These rollers that was underneath, they must have extended probably four inches high. I don't know, to really say, that they extended out, but at a distance away you can see the roller at the back; you can see it pretty easily.

(Testimony of Barnard McHugh.)

Q. You can see it pretty easily from a distance?

A. Yes; from a distance you can see it easily.

Q. Barney, you know Alice McNutt?

A. Yes, sir; I know something about her.

Q. Pardon me?

A. I know something about her.

Q. Is Alice McNutt a friend of yours?

A. Personal enemy of mine.

Q. Personal enemy of yours?

A. Always has been.

Q. Always has been. A. Yes.

Q. Didn't she live down near your place?

A. She lived about the next house.

Q. She lived in the next house?

A. Last summer for a while.

Q. And she never came over to your house, did she? A. About once or twice.

Q. About once or twice? A. Yes, sir.

Q. And you went over there once or twice?

A. I have been up in her house once.

Q. During last summer? A. Yes, sir.

Q. Now, Barney, I want to ask you if during those occasions [248] you didn't tell Alice McNutt that it was difficult to always keep limping in walking about town because "my," meaning your, "foot is as good as anyone's"?

A. Never told her nothing of the kind.

Q. Never made any such statement as that to Alice McNutt? A. No, sir.

Q. And didn't you also tell her, some time about May 16, 1922. that you had been or were preparing

(Testimony of Barnard McHugh.)

to go out to some camp to work but you changed your mind about it and that while you were able to work, you were going to get wages from the company; that is, the Alaska Steamship Company, all summer, and that you could sell liquor on the side, intoxicating liquor on the side because you could keep up the limping and the Chief of Police and the authorities would have pity on you and in that way you could get by? Didn't you make such a statement as that to Alice McNutt? A. No, sir.

Q. You never told her anything of that kind at all? A. Never said anything of the kind.

Q. Didn't you, also, on or about the same time, Mr. McHugh, tell Mons Halsor, the man that you call Ole, the man that stood up back in the courtroom a few minutes ago, didn't you also tell him the same thing, that your foot was all right, but that you were going to keep on limping because by doing that you could get some money out of the steamship company? A. No, sir; that man accused me—

Mr. ROBERTSON.—(Interrupting.) Now wait—
[249]

The COURT.—Answer that yes or no.

A. No, sir; I never told him.

Q. Never told him that. How many times have you been to Dr. Mustards office, Barney?

A. I have been about on an average, about once in two weeks.

Q. You have been there about once every two weeks. Have you also talked with Doctor Mustard about the case? A. No, sir.

(Testimony of Barnard McHugh.)

Q. Never talked to him about the case at all?

A. Talked to him about my foot.

Q. Just talked to him about your foot?

A. I always told him where it hurted, how much it hurted and so on and so forth.

Q. Didn't you mention the case to him?

A. No, sir.

Q. You didn't make any mention to him about the case? A. No, sir; never.

Q. Now, Barney, I understood you to say that you were working there at the rate of 75 cents an hour? A. Yes, sir.

Q. Seventy-five cents an hour?

A. That is what I overheard the longshore boss tell another longshoreman, another man that was hired there on the evening of March the eighth.

Q. You did have the right to quit whenever you wanted to?

A. A man has got the privilege of quitting whenever he wants to in any work.

Q. And you could quit any time you wanted to on that job, could you not? [250]

A. I suppose so, the same as any other work.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

(Whereupon a short recess was taken.)

Mr. WICKERSHAM.—May it please the Court, I offer in evidence the expectation table, showing the life expectancy of men at certain ages. It may be admitted by the counsel on the other side.

Mr. ROBERTSON.—Now, we object to that as

being incompetent, irrelevant and immaterial in this case. No death has occurred and there is no testimony indicating that the plaintiff's life will be shortened or anything else, by reason of the accident. It's absolutely incompetent, irrelevant and immaterial.

The COURT.—The purpose of counsel is to show the prospective.

Mr. WICKERSHAM.—Injury and damages.

The COURT.—Prospective damages during his natural life.

Mr. ROBERTSON. What have you there?

Mr. WICKERSHAM.—The blue-book of the Equitable Life.

Mr. ZIEGLER.—If the Court please, the further objection is that there is no testimony showing, or indicating that this injury is of a permanent nature or that the expectancy of life enters into it in any manner.

The COURT.—On that question, I'll hear from you.

Mr. WICKERSHAM.—Well, if the Court please, I'll just let that matter stand for the moment. I want to offer some other testimony and there will be a motion and the Court can take the whole matter up then. [251]

Mr. WICKERSHAM.—I desire to offer in evidence the original answer in this case and the amended answer in this case and the affidavit made by Mr. Robertson upon which the amended answer was filed.

The COURT.—What is the purpose of that?

Mr. WICKERSHAM.—The purpose is to show their change of attitude on the matter of the customary manner of the management of this tub, and so forth.

The COURT.—Any objection?

Mr. ROBERTSON.—It seems to me that it is immaterial. I don't see—

The COURT.—I don't see the materiality of it. Objection sustained.

Mr. WICKERSHAM.—Well, aren't the pleadings always in evidence, may it please the Court?

The COURT.—The pleadings are always before the Court, but I don't see how it is material—any change.

Mr. WICKERSHAM.—Well, they make one statement at a *certain and* then they come in subsequently and change it. I don't like to make it stronger than that before the jury, but that is the situation.

The COURT.—Well, you may make the offer and I'll hear you on the argument.

Mr. WICKERSHAM.—Then I offer to introduce the original answer in this case, the amended answer of the defendant and the affidavit of Mr. Robertson upon which the amended answer was allowed to be introduced.

Mr. ROBERTSON.—We make the objection to that that it is immaterial. [252]

The COURT.—You rest, then?

Mr. WICKERSHAM.—So far as our evidence

is concerned. With the exception of passing upon these matters, we rest.

The COURT.—All right, the jury may be excused for a short time.

(Whereupon the jury retired.)

The COURT.—I'll hear you on the first question as to whether there is any evidence tending to show the permanency of the injury.

Mr. WICKERSHAM.—Well, Doctor Mustard swore that, I think, quite positively.

The COURT.—He did not, as I understood his testimony. He swore that he couldn't tell whether it would be permanent or whether it would heal.

Mr. WICKERSHAM.—No; he swore that the bone would always remain there, just as it is. That is what he swore to, but he said that he couldn't tell how, in the course of time, the presence of that bone might affect it; that it might, through use, cease to hurt him, but he couldn't tell about that; but the bone, he said, was permanent, because I asked him about that especially.

The COURT.—This testimony goes not to the injury to the bone, but it goes to his earning capacity, and there is no testimony here showing that his earning capacity has been permanently impaired, or showing that the deprivation of his earning capacity will be permanent. This excrescence or growth may be permanent, but that does not necessarily destroy his earning capacity in the future. He said that he could not tell whether it

would or not; that it may become so that it will not hurt him or not interfere. [253]

Mr. WICKERSHAM.—It might.

The COURT.—And I don't see how the testimony is material. It is a matter that the jury can take into consideration. They would first have to determine from that that his earning capacity was destroyed for all his future life. There is nothing in the testimony showing that or his expectancy.

Mr. WICKERSHAM.—The purpose of offering the testimony, may it please the Court, was to show that this man would live a certain length of time ordinarily after this time.

The COURT.—Yes.

Mr. WICKERSHAM.—That's all I offer it for.

The COURT.—That is, for the purpose of showing his earning capacity?

Mr. WICKERSHAM.—Not at all.

The COURT.—Then, what is the purpose of it.

Mr. WICKERSHAM.—The purpose of it is to show that ordinarily he will continue to live for many years.

The COURT.—Yes.

Mr. WICKERSHAM.—Then the evidence we have introduced shows that the injury to the foot is permanent and that in those years he will have that permanent injury on his foot. Now the doctor did say that he could not say positively that he might recover at some time in the future.

The COURT.—I sustain the objection.

Mr. WICKERSHAM.—We take an exception. Now, with respect to the pleadings, of course, the authorities are all one way—that the pleadings may be offered. [254]

* * * * *

The COURT.—I don't think it could be brought in in the way of impeachment. Of course, all the pleadings in the case are a part of the record in the case and under certain circumstances they may be introduced in evidence, and they may be read to the jury and the pleadings may be read by the counsel and commented upon, without being introduced in evidence.

Mr. WICKERSHAM.—That's all I desire to do, may it please the Court.

The COURT.—You may introduce the original complaint, if you so desire.

Mr. WICKERSHAM.—The original answer you mean.

The COURT.—The original answer, if you so desire, in evidence, but the other answer is a part of the record in the case and may be read, may be commented upon with reference to the original answer.

Mr. WICKERSHAM.—Then will it be admitted?

The COURT.—It will be admitted—the original answer.

Mr. WICKERSHAM.—And we will be permitted to use the other answer and comment upon it?

The COURT.—Certainly.

Mr. ROBERTSON.—Then I understand, if the

Court please, that the plaintiff will also be bound by that original answer. They have made that a part of their case in chief and necessarily they will be bound by it.

Mr. WICKERSHAM.—We have stated to the Court why we offer it.

* * * * *

Mr. ROBERTSON.—We take an exception to that. [255]

The COURT.—I believe I'll reverse that ruling, strike out the amended answer and deny the motion.

Mr. WICKERSHAM.—We take an exception.

The COURT.—It may be introduced in rebuttal. Whereupon the plaintiff rested.

Mr. ROBERTSON.—The defendant at this time moves the Court that a judgment of nonsuit be entered in favor of the defendant and against the plaintiff.

The COURT.—Is that all your motion? What are your grounds?

Mr. ROBERTSON.—If the Court wishes to hear me?

The COURT.—I'll hear you.

Mr. ROBERTSON.—Our point is simply this, that the plaintiff has entirely failed to bear out or support the burden of proof as thrown upon it in such cases as this. In the first place there has been no negligence shown, we contend, on behalf of the defendant; there is no negligence brought home to the defendant in the case in any manner whatsoever; that while it is true there was someone, I

don't recall which witness testified at one time that he spoke to someone at some time, he also stated he did not know who it was and he did not state who it was. That first gentleman, Mr. Young, who testified about the bucket on the afternoon of the day before, said that he himself had kicked about that as much as anybody, but he gave no testimony that any notice was brought home to the steamship company.

Now, if the Court please, assuming that we are mistaken on that point, the point is simply this: that the negligence, if any, arose in this case out of the lack of ordinary and [256] reasonable care by the plaintiff himself. The evidence discloses by the witness Soderberg that whatever defect was in the bucket could have been easily seen and that is certainly corroborated by the witness Young; that if there was any defect, it was easily seen; also by the witness Gillis, but the witness Soderberg testified directly that the defect was plainly visible and discernible.

Now, so far as any question in this case is concerned about the place in which they were working being a safe place to work, there is no evidence of that whatsoever. The evidence from the witness-stand, so far as my recollection serves me, is, on the contrary, that it was a well-lighted place. The first witness on the stand testified as to the glare of the lights. Plaintiff himself testified that he could see; that he could even see the wheel; he could easily see the wheel at the rear of the tub down

near the floor. He also testified that his eyesight was good. Now, he also testified that he has had a good deal of experience in various capacities, not simply as a common laborer, but in work of a higher type than common labor. Now it is true that he claims that in this kind of work, unloading coal, that was his first experience, but after all he had worked, as he said himself, five hours and going on the sixth hour, according to his own testimony, before the accident occurred. Now, then, he said that he had handled plumbing tools, pipes and things of that kind. He gave us a long description, on direct examination of the piping that he put in, as I understand, up at the Kennecott mine, or some other place. Therefore, it was incumbent on [257] him, as a matter of fact, when he went into that place, to examine the tools with which he was to work and to discover any patent defects, and it was very aparent to the other witnesses that this was a patent defect, and then he comes on the witness-stand and admits that he made no effort whatsoever himself to make a discovery as to whether there was anything wrong with the tub. Furthermore, the tub itself was used over a long period of time without any injury or harm, and at night, when he went on, one of the men working with him said that he had noticed that the first tub there happened to spill and yet this man even after that continued to work with it and he doesn't claim that he made any protest to anyone about the tub, and we believe that the law, when applied to those

(Testimony of O. W. Pollow.)

facts, fits in squarely on the proposition that he has failed to use the ordinary care and the reasonable care required of him as a workman and that at this time he is not entitled to have the case go to the jury.

(Whereupon, after argument, motion for nonsuit was denied.)

Mr. ROBERTSON.—We take an exception, to the Court's denial of our motion of nonsuit.

And thereupon, the jury being present in the box, the defendant to maintain the issue on its part, introduced the following evidence, to wit:

Testimony of O. W. Pollow, for Defendant.

O. W. POLLOW, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Will you please state your name? [258]

A. O. W. Pollow.

Q. How old are you? A. Forty-three.

Q. What is your business or occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. About fifteen years.

Q. In what waters? A. Why—

Q. (Interrupting.) Whereabouts? What is the scope of your master mariner's papers?

(Testimony of O. W. Pollow.)

A. Thirteen years on Puget Sound and two years in Alaskan waters. No, sir; put in more than that. I'll take that back.

Q. How many years altogether?

A. I have had about three years in Alaskan waters.

Q. About three years in Alaskan waters?

A. Yes, sir.

Q. How many years altogether have you been a master mariner? A. About fifteen years.

Q. How many years altogether following the sea? A. About eighteen, nineteen years.

Q. Prior to being a master mariner, what position were you in?

A. Why, I was a sailor most of the time; that is my experience on the water.

Q. That is what I mean. In whose employ are you, Mr. Pollow?

A. I have been, for the last ten years, in the employ of the Alaska Steamship Company.

Q. Were you in its employ on March 8 or March 9, 1922? [259] A. Yes, sir.

Q. In what capacity?

A. I was third mate of the steamer "Latouche."

Q. Were you in Ketchikan on March 8 and 9, 1922, when the steamer "Latouche" was in port here? A. Yes, sir.

Q. Are you familiar with the steamer "Latouche"? A. Perfectly.

Q. How long have you served on her?

A. About ten months.

(Testimony of O. W. Pollow.)

Q. About ten months? A. Yes, sir.

Q. Altogether? A. Altogether.

Q. Are you familiar with the position of her decks and hatches and things of that kind?

A. Yes, sir.

Q. I will ask you, Mr. Pollow, to look at this plat and state whether or not, from your knowledge of the steamer "Latouche" and having examined the plat, that is a correct plat of the steamer "Latouche"?

A. This is a correct plat of the loading chart of the steamer "Latouche."

Q. Where did the plat come from?

A. It come from the Alaska Steamship Company.

Q. Where did you get the plat?

A. I got it off the steamer "Latouche."

Mr. ROBERTSON.—Now, we would like to introduce the plat in evidence in connection with the witness' testimony. We just want it for the purpose of illustration. Do you have [260] any objection?

Mr. WICKERSHAM.—No; I am not making any objection. I don't desire to waive it.

The COURT.—You want to introduce it simply for the purpose of illustration?

Mr. ROBERTSON.—That's all; simply for the purpose of illustration.

The COURT.—Just mark it for illustration. It is not introduced in evidence.

(Testimony of O. W. Pollow.)

Q. What was the "Latouche" doing in port on those days? A. Unloading cargo.

Q. What kind of cargo?

A. Why, coal and general merchandise, powder.

Q. Now, from what hatch were you unloading coal? A. No. 2 hatch.

Q. Will you kindly step down and show on the chart where the No. 2 hatch is?

A. This is No. 2 hatch, here (indicating).

Q. Designate it by the words No. 2.

A. Here (marking).

Q. Now, what does this plat show?

A. That shows the 'tween-decks.

Q. What is the next one below that?

A. That shows the 'tween decks.

Q. What does the next one show?

A. That shows the hold.

Q. What does the bottom one show?

A. That shows the side view.

Q. That is the profile of what ship?

A. Of the "Latouche." [261]

Q. Now, then, on what deck was it that the coal was being discharged from?

A. On the 'tween-decks.

Q. On the 'tween-decks, out of the No. 2 hatch?

A. Yes, sir.

Q. Do you know how much coal was discharged at Ketchikan that trip? A. About 400 tons.

Q. At what dock did the ship lay while she was discharging coal?

A. The Ketchikan warehouse; Ketchikan dock.

(Testimony of O. W. Pollow.)

Q. Ketchikan dock here, right on the Narrows?

A. Yes, sir.

Q. Can you recall at this time as to which way her bow lay, which side of the bow was alongside of the dock?

A. Laying on the port side; left-hand side to the dock.

Q. Which way is it customary to land at these ports or port? A. That depends on the tide.

Q. That depends on the tide? A. Yes.

Q. Now, then, were you on shift at any time while the cargo of coal was being unloaded?

A. I was on shift when we first started to unload.

Q. You were on shift at the beginning?

A. Yes, sir.

Q. Now what are your duties as third mate?

A. My duties on the ship, when she is in port, is, when she is in port and in charge of my watch, handling freight and taking care of the deck machinery and freight and when she [262] under way, I assist in navigating the ship.

Q. Now, when you were in port at that time, at what time did you go on watch?

A. I go on watch at twelve o'clock.

Q. Did you on that occasion, I mean?

A. Yes, sir.

Q. You mean twelve o'clock noon or twelve o'clock midnight? A. Both.

Q. You go on shift.

A. I work from twelve o'clock until four twice a day.

(Testimony of O. W. Pollow.)

Q. I see. A. Making eight hours a day.

Q. Now, was that the situation on this particular occasion? A. Yes, sir.

Q. What time did you commence to discharge coal, do you recall now? A. Not exactly.

Q. I will ask you, Mr. Pollow, do you have with you the log of the steamship "Latouche"?

A. Yes, sir.

Q. That you used at that time. Did you assist in keeping the log? A. At all times.

Q. That is to say, when you are on shift, what, if anything, do you have to do with the keeping of the log?

A. I have to keep the log on my watch on deck at all times.

Q. Keep the log at all times. A. Yes. [263]

Q. By turning to the log, can you refresh your memory as to just when you started to unload the cargo?

A. Certainly. (Looking at log-book.) We arrived at Ketchikan at ten thirty A. M., March 8.

Q. What time did you start to unload or discharge?

A. We commenced to discharge coal at 1:15 P. M.

Q. What day? A. March eighth.

Q. March 8, 1922? A. 1922.

Q. Now, do you recall, Mr. Pollow, what crew, if any, were working, discharging cargo that afternoon?

A. That afternoon we was using the ship's crew and some longshoremen to fill out.

(Testimony of O. W. Pollow.)

Q. You were using the ship's crew and some longshoremen to fill out. A. Yes, sir.

Q. What, if anything, did you do in the evening?

A. At six o'clock we knocked off for supper.

Q. At six o'clock you knocked off for supper.

A. Yes, sir.

Q. When did they go back to work again?

A. At seven o'clock.

Q. Now, then, were you on shift at that time?

A. No, sir.

Q. When did you next go on shift again?

A. At midnight.

Q. But you were on shift up to what time in that afternoon? A. Four o'clock. [264]

Q. Until four o'clock in the afternoon?

A. Yes, sir.

Q. Now, do you recall, during that time, Mr. Pollow, as to how many tubs, if any, were being used in discharging coal? A. Three tubs used.

Q. Now, are you familiar with the coal tubs that are used for the discharge of coal?

A. Some; yes.

Q. How did you gain that familiarity, will you please tell the jury? How did you get your familiarity with coal tubs?

A. By working with them.

Q. In what capacity?

A. As mate, second mate and third mate.

Q. How extensive has been your use of coal tubs?

A. Well, in the two years' experience that I have had, we haven't made but one or two trips

(Testimony of O. W. Pollock.)

without coal and we never take less than 250 tons and from that up to 2400 or 3,000 tons.

Q. Have you personally handled coal tubs?

A. Yes, sir.

Q. What have you done with them, or have you had occasion to do with them?

A. I have acted as the man on the dump to dump the coal.

Q. That is, you mean, as hopper man?

A. Well, yes; I have relieved the hopper man for lunch at times.

Q. What did you mean when you said you acted as the man on the dump?

A. Well, there's lots of times we don't dump in the hopper; we dump right on the pile of coal on the dock; deliver the [265] coal on the dock—loose coal.

Q. Now, then, do you know the general construction of the coal tubs used by the Alaska Steamship Company? A. Yes, sir.

Q. Did you know the general construction of coal tubs used by it on the steamer "Latouche" on this particular occasion? A. Yes, sir.

Q. Were you familiar, or are you familiar with those tubs? A. I was perfectly familiar.

Q. You were perfectly familiar? A. Yes, sir.

Q. And how many were there? A. Three.

Q. How many of them were being used?

A. Three.

Q. Where were they being used?

A. Being used in No. 2 hatch for unloading coal.

(Testimony of O. W. Pollow.)

Q. Now, then, I'll ask you to look at this drawing here that has been used in illustration of the coal tub in question, Mr. Pollow. Will you kindly step down here and explain to the jury wherein, if in any place, that tub differs from the tubs that were in use on the steamer "Latouche" on March eight or ninth, 1922.

A. This (pointing) patent locking device is entirely on the wrong side of the bail.

Q. How was the patent locking device put on?

A. It was fastened to the bail with a small structure here to hold it in place (indicating) and it tripped across here on a block on the outside of the bail. There was a block here [266] (indicating) that caught the bail and kept it from going forward and the trip was hooked over the same block.

Q. Do you notice anything else on that illustration besides what you have mentioned?

A. Well, it had a little—it had little handholds here (showing).

Q. What were those handholds made of?

A. Round iron, a little bit heavier than that (showing); just a nice handhold so that you could take hold of it and pull the tub forward, and then on those wires were fastened a little becket, possibly two feet along that hung down here to take hold of to drag the bucket forward with.

Q. What do you mean by becket?

A. I mean the small piece of line that is made fast there for that purpose.

Q. A piece of rope?

(Testimony of O. W. Pollow.)

A. The rope, yes, two-inch rope or a two and a half inch rope.

Q. Do you know whether or not— What is the usual term aboard ship used to describe such a line as you have just mentioned? What is it usually called? A. A hand becket.

Q. That is called a hand becket? A. Yes.

Q. Do you know what it is they call a grommet?

A. A grommet?

Q. Yes, a grommet.

A. That is a sling; an ordinary cargo sling would be a grommet. Anything fastened together to make a complete circle would be a grommet.

Q. Did you hear Mr. Young's testimony about something that was [267] kind of like a doughnut, cut out like a little wheel on the outside?

A. Yes, sir.

Q. What do you call those things on board ship?

A. Well, I don't know just now what it might be, but that would be as near a grommet as you could get.

The COURT.—Mr. Young was testifying to the iron on top of the bail.

Mr. ROBERTSON.—Perhaps I may have misunderstood him.

Q. There was an eye up here? A. Yes, sir.

Q. Now, Mr. Pollow, have you drawn a rough plan or chart of the tubs that were in use at that time?

A. I have just drawn one on a sheet of paper.

Q. Have you got it with you? A. Yes, sir.

(Testimony of O. W. Pollow.)

Q. Well, will you let me see it? A. Yes, sir.

Q. Now, Mr. Pollow, is this drawing drawn to scale? A. No, sir.

Q. Is it intended to be anything more than a rough— A. (Interrupting.) Just approximate.

Q. (Continuing.) Representation?

A. Just a rough representation of the bucket.

Q. Does it correctly or incorrectly depict the kind of coal tubs that were used on the steamer "La-touche" on March eight and ninth in Ketchikan?

A. As near as I could draw it to its exact, to the exact coal bucket in every way.

Q. Without drawing it to scale? [268]

A. Yes.

Mr. ROBERTSON.—I am going to ask to have it used for the purpose of illustration. Is there any objection?

Mr. WICKERSHAM.—Yes; I object to everything.

The COURT.—What's that?

Mr. ROBERTSON.—Well, he objects to everything.

Mr. WICKERSHAM.—Well, I mean by that, may it please the Court, that I don't want to be bound by anything.

The COURT.—It may be received. You want to use it for the purpose of illustration?

Mr. ROBERTSON.—Yes; your Honor.

The COURT.—It may be received for the purpose of illustration.

Q. I will ask you to kindly step down here again

(Testimony of O. W. Pollow.)

for a moment, and step to one side so that the jury can see. What different views there have you depicted of the tub?

A. This is the bucket standing on deck, with a side view (showing); and this is the bucket standing on deck with a front view (showing).

Q. What is the other?

A. This is the bucket hanging on the cargo hook.

Q. Well, now, if you turn it that way, what does it depict?

A. That way, it shows the bucket being dragged from under the deck.

Q. By what? A. By the winch or the falls.

Q. I will ask you whether or not this shows this trip that you are referring to on this bucket here?

A. Yes, sir. [269]

Q. Now, I will ask you to point that out to the jury, where that is shown.

A. Here is the trip here (indicating); runs up here and crosses the bail right there. It is fastened on to the bail. There is a little block right in there (showing) where the hook hooks over.

Q. Now, mark that with an A or B to indicate that.

A. This, where the hook hooks over the block, I have marked "trip."

Q. "Trip"? A. Yes.

A. Now, then, referring to this illustration, this chart that you are using and the one on the black-board, which one of them depicts a correct repre-

(Testimony of O. W. Pollow.)

sentation of the coal tubs that were being used on the "Latouche" on that trip, on that occasion.

A. This is nearer like the coal tub used, while this (indicating) is a better drawing; but this (indicating) is nearer like the shape of the bucket and this is nearer like the shape of the trip.

Q. How about with reference to the position of the trip?

A. Well, the trip in this position, doesn't show where it is made fast, and in case you pull this way on this trip, it would have a tendency to lock the bucket. I don't see how that could work at all.

Q. Now, then, how does that trip operate?

A. This trip, by pulling this lever this way, lifts that hook and lets the bail hang loose.

Q. I see. What, if anything, was there on the front part of [270] the bucket, on the lip or near the lip?

A. On the front part was these little hand irons here to take hold of.

Q. Have you indicated those?

A. I put "pull beackets" here (showing). I haven't marked the little hand irons themselves.

Q. Now, then, how many wheels do the buckets have? A. Three wheels.

Q. Where are they located?

A. One on each forward corner and one on the middle, at the back of the bucket.

Q. Could you see the one in the back?

A. Well, from a side view, if you were standing perfectly abreast, away from the bucket a ways, you

(Testimony of O. W. Pollow.)

could see it, but just a little over and you couldn't see it unless you were on the back side of it.

Q. What is the customary way of discharging a coal bucket after it is loaded, Mr Pollow?

A. Well, it was hoisted up with a double winch and it was hoisted over a hopper, as we did here, and the man on the hopper dumped the bucket into this hopper, and it was an open-bottom hopper and there was a car running under this hopper and that dumped coal in this hopper went into the car, and they wheeled it into the warehouse and dumped it.

Q. Now, then, I understood you to say that you were discharging coal out of No. 2 hatch.

A. Yes.

Q. Whereabouts, show on the chart, if you can, approximately where the coal pile was that was being unloaded or taken off. [271]

A. The coal pile was on this deck, between decks, right across here (showing).

Q. Where was it when you first broke, took off your hatch cover to break—

A. (Interrupting.) When we first took off the hatch cover, the coal was all over here (indicating).

Q. Where, if you know, did the winchman stand that operated the winch, with the tackle and all, that brought the tubs up?

A. The winchman stood right here (indicating) between this mast and the edge of the hatch. In fact, he was right on the edge of this hatch.

Q. Where was the boom or falls from which you were operating, by which this coal was brought up?

(Testimony of O. W. Pollow.)

A. This represents the masts. The boom ran off from there and went up on the dock and the other one went over this way on this side of the ship, over this way (indicating).

Q. Where, on the steamer "Latouche," is the forward mast? A. The foremast is right here.

Q. You went off shift at four o'clock in the afternoon? A. Yes, sir.

Q. And then when did you go back again?

A. At midnight.

Q. What, if anything, happened in the way of your work between twelve and one o'clock, as to whether it continued or ceased?

A. At twelve the men quit for lunch.

Q. When did they go back to work again?

A. At one o'clock.

Q. Who was on shift as mate at that time?

A. I was on shift as mate. [272]

Q. You were on shift as mate. A. Yes.

Q. How many buckets were being operated at that time? A. Three buckets.

Q. How many men in the hold?

A. There were nine men in the hold.

Q. Who were those men? I mean to say, with respect to what class of men were they?

A. They were all longshoremen.

Q. They were longshoremen. Was Barney McHugh with them?

A. Well, I understood later he was. At that time I didn't know.

(Testimony of O. W. Pollow.)

Q. At that time you weren't personally acquainted with him?

A. I didn't know what his name was.

Q. Then, when you came on shift and the work started, Mr. Pollow, I wish you would kindly explain to the jury just how, if at all, the place where the men were working was lighted.

A. We have a cluster of lights—

Q. (Interrupting.) No, referring to this particular occasion, now.

A. We have a cluster of lights—we have eight sets of cluster lights about—they were in a disk about this large (showing) and all the way from five to seven and eight lights in a cluster—

Q. (Interrupting.) Now, pardon me, what size globes or lamps are they? A. They were—

Q. (Interrupting.) I mean with reference to candle-power or watts?

A. They were 40-watt globes. [273]

Q. Forty watts.

A. Uniform globes on all boats.

Q. What, if anything, is on the back of the lights, or the cluster?

A. There is a reflector in the back of this cluster.

Q. Very well.

A. Now, they were placed where the winchman stood; there was one cluster hanging in each hatch coaming, tied up slightly forward to shine down on this coal pile, and forward under the hatch, where they were working under this hatch, and there was one cluster of lights hanging in either wing, shining

(Testimony of O. W. Pollow.)

on the coal pile, and then there was a light here (indicating). We often had a light— I don't remember whether the light—

Q. (Interrupting.) Never mind if you don't know about it. Now what, if any stationary lights were there in the hold at that time?

A. There were lights about every twelve or fourteen feet. I don't know exactly how far they were apart, but nearly that under the deck and in each wing, shining down on the deck.

Q. Now, what, if anything, would those lights do with reference to making the place where the men worked dark or light?

A. They would make it very bright. You could see in all directions.

Q. Now, how was the work going on down in the hold? I mean by that—you say there were three tubs down there. What, if anything, was done with the tubs relative to working helter-skelter or on some kind of plan. [274]

A. They took the tubs out in uniform rotation there. They would take out one, send it up and send it back; take this one up and dump it and send it down, and then take out the third one and send it back in rotation and come back to this one again.

Q. When you say this one I wish you would designate it in some way.

A. Well, for instance, we'd start with the one in the port wing first, take that up on the dock and dump it and bring it back and load it; then take the one from amidships, hoist it up on the dock and

(Testimony of O. W. Pollow.)

dump it and bring that back and load it, and then take the one from the starboard wing, hoist it up and dump it and bring it back and then go on over the same routine again.

Q. How many tubs, Mr. Pollow, do you discharge in an hour? A. Oh, I should judge about thirty.

Q. How many tubs of coal did you discharge an hour? A. About 25, 26, 27.

Q. During the period from one o'clock on, how many tubs were being used for, say, the next hour?

A. From twelve o'clock on—

Q. (Interrupting.) I mean from one o'clock on. I beg your pardon.

A. From one o'clock on, there were three tubs being used.

Q. And at about what speed were they being operated, if you recall at this time, on that particular occasion? A. About the usual speed.

Q. Now, then, Mr. Pollow, with reference to these tubs, do you [275] know whether or not there is any difference between operating the tubs, in the moving of the tubs, as to whether or not they are moved with the rear going forward or with the front going forward, do you know that?

A. There is a big difference, yes, sir.

Q. What is that difference?

A. There is nothing to pull on if you pull it sternward.

Q. When you say there is nothing to pull on, what do you mean by "nothing" but what?

(Testimony of O. W. Pollock.)

A. But the rim of the bucket; grab hold of the bucket or take hold of the bail and pull on it.

Q. How could you take hold of the bail?

A. That is very simple. Just grab hold; one man on each side, take hold of the bail and pull on it.

Q. What is there for pulling it with the lip forward?

A. With the lip forward, you have your hand beackets here (indicating) to pull on.

Q. When the tubs come back down, after having been dumped, into the hold, what is customary with reference to moving them back into the hold, as to what manner they are moved in?

A. When they are landed in the hold, one man unhooks the bucket and the other two men simply get the bucket up to the coal pile.

Q. What direction do they move it in?

A. The best way to move it is with the lip forward.

Q. Why so? A. Easier to handle.

Q. Why is it easier to handle? [276]

A. Because you have your beackets to pull on.

Q. How many wheels are there at the rear?

A. There is one wheel at the rear.

Q. How many at the front?

A. Two at the front.

Q. What, if any, difference does that make in the pulling of it?

A. I don't know that it would make any difference in the pulling of it.

Q. Now, then, when the tub comes out from un-

(Testimony of O. W. Pollow.)

derneath the hold, after it is loaded, how is it taken out?

A. Well, it is under the deck. It has to be dragged from in under the deck on account of this bail. They unhook it, let it flop down loose, then they drag the bucket right out until it gets out under the fall; then they latch it and they first put that safety on and take the bucket out.

Q. How is it pulling on it with—what effect does the pulling on the bail by the hook have on the bail itself with reference to any movement? You understand what I mean?

A. What effect it would have?

Q. Yes.

A. When it is down or when—?

Q. Yes; when it is down and being pulled out?

A. It gives a direct haul from the center of the bucket. If the bail was not let down it would tip the bucket over forward or would pull it.

Q. Do you know from your experience with coal buckets as to what is the safe manner of using them and what is an unsafe manner of using them?
[277]

A. Yes.

Q. What is the safe manner of using them?

A. At any time after those buckets are lowered into the hold, why, if you get on the forward side of this bucket and pull on these beackets, there is no chance of any danger whatever.

Q. Why it that?

A. Because the bail is fixed so that there is a

(Testimony of O. W. Pollow.)

block there. The bail cannot go forward. The bail must fall backwards if the bail should fall anyway at all. If a man stands on this side (indicating), he can't get hurt.

Q. If the trip was taken off, would the bail move forward?

A. The bail can never move forward because that block is stationary, made fast to the bucket itself. The bail cannot go forward at any time.

Q. Could the bail go forward if the trip was defective or taken off altogether? A No, sir.

Q. Why is that?

A. Because that block is there, stationary, bolted on to the machine, bolted on the bucket and it cannot—the bail cannot go forward at any time.

Q. Now, then, how many men does it require to handle one of those buckets when it is empty?

A. Well, one man can handle a bucket.

Q. How do you know that?

A. Because, I have handled them myself.

Q. How many men generally handle them when they are down in the hold working on them?

A. We generally have three men on them. [278]

Q. What do they do?

A. Well, as a rule, there is one man unhooks the bucket and the other two drag it on to the coal pile.

Q. Now, Mr. Pollow, on this night, or at the time of discharging this coal, did you ever have any occasion to say anything to any of the men working in the hold with reference to the operation of the bucket? A. Yes, I did.

(Testimony of O. W. Pollow.)

Q. What, if anything did you tell them?

A. I always say more or less to them in regard to handling the buckets. I always have to break them in, lots of times, when they are new men.

Q. What, if any, instructions did you give these men?

A. I told them on different occasions to turn the bucket around so they could pull it. They would have to get the tub in shape so they could get it under the deck.

Q. And you told them to turn it around so they could pull it? A. Yes.

Q. Turn it around, in what way? How do you mean?

A. Those buckets don't always land with the lip the same way and lots of times they land backwards, so that the back of the bucket is where the nose ought to be.

Q. Yes, sir.

A. So they have to turn the bucket around, drag it into place and it is much easier shoveling into the bucket with the nose next to the coal pile than it is with the back.

Q. Why is that?

A. The back is perpendicular and the bail is closer to the back of the bucket than it is to the front. There is more [279] room to shovel up into the bucket from the front end.

Q. Do you know whether or not you told the plaintiff McHugh, gave him instructions.

A. I told that gang in which he worked.

(Testimony of O. W. Pollow.)

Q. Were all the men there, the nine men.

A. Nine men were in the hold at that time.

Q. Did you say it in a low or loud tone of voice?

A. I always speak loud to them so they can all hear.

Q. Where were you when you were speaking to them?

A. I was standing in the square of the hatch on the coal pile.

Q. On the what? A. On the coal pile.

Q. You mean by that that you were below the main deck.

A. Below the main deck, up where they were working.

Q. What, if any, instructions did you give them, relative to using the tackle on the tubs? Did you have any occasion to give them any instructions relative to that? A. The bail you mean?

Q. Yes.

A. I told them to let that bail down. They didn't know how to do that until after I told them; let the bail down and drag the bucket out.

Q. Now, then, Mr. Pollow, what, if anything, occurred there after you went on shift relative to McHugh?

A. Well, about an hour after he went on shift, the man got hurt.

Q. Where were you at the time he got hurt?

A. I was— I must have been right on the dock at that time.

Q. Did you personally see him get hurt?

(Testimony of O. W. Pollow.)

A. No, sir.

Q. You didn't see it? [280] A. No, sir.

Q. What, if anything— Where did you go immediately after that?

A. I was coming aboard when I saw him limping on deck, and leaning up against a life-boat there.

Q. Do you know what bucket it was he claimed to have been hurt with? A. Yes, sir.

Q. Were you familiar with that bucket?

A. Yes, sir.

Q. How did that bucket differ from the other buckets by the bail not being able to go forward?

A. Not a bit.

Q. Could the bail on that bucket have fallen over the lip of the tub? A. No, sir.

Q. Why not? A. Because that iron block that is attached to the bucket wouldn't let it go forward.

Q. What, if anything, was on that bucket by which it could be handled?

A. You would have the pulling beackets on it.

Q. What do you mean by "pulling beackets"?

A. Those ropes hanging down forward, on the front end of the bucket.

Q. Now, did you make a hasty scrutiny of the tub to ascertain that fact?

A. At the time of the accident?

Q. Yes, sir. A. No, sir. [281]

Q. What did you do? Did you look at it carefully?

A. Why, I know the tub was all right at that

(Testimony of O. W. Pollow.)

time, because they were all alike. There was nothing wrong with them; they were fixed.

Q. Did you see this particular tub?

A. Yes, sir.

Q. What, if any, occasion did you have to look at the tub before the work started at one fifteen the preceding day, March eighth.

A. Oh, I didn't examine the tubs closely at any time.

Q. Where were you during the work?

A. I was right amongst the men and on the dock; on the boat and amongst the work all the time.

Q. What, if anything, was called to your attention by any of the men to the effect that the tubs or any of them were defective?

A. Why, when McHugh got hurt—

Q. (Interrupting.) I mean prior to that time.

A. There was no— My attention was never drawn to the buckets until that time.

Q. Who, if anyone, made any complaint about the tubs prior to that time?

A. Nobody ever made a complaint to me.

Q. Nobody? A. No.

Q. At that time, after McHugh got hurt and you were working there, did you have occasion to notice in what position the tub was in? A. Yes, sir.

Q. What was the position, at that time, of the tub? [282]

A. It was standing with the back toward the coal pile.

Q. About where was the tub?

(Testimony of O. W. Pollow.)

A. Oh, about ten feet under the deck, I should judge; something like that.

Q. How far back had the work progressed underneath the coaming of No. 2 hatch at that time?

A. Oh, I should judge fifteen or eighteen feet.

Q. You got back fifteen or eighteen feet?

A. Yes, sir.

Q. Underneath the coaming? A. Yes, sir.

Q. In which wing was it McHugh was hurt?

A. In the port wing; left-hand side, next to the dock.

Q. Left-hand side next to the dock?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir; because when I looked down there, the other two tubs was being filled and this tub was standing there, and two men were looking at it where the man got hurt.

Q. Was the work being carried on with the other two men at that time?

A. They didn't for a few minutes, but they did after a while.

Q. I mean with the other two tubs?

A. Oh, the other two tubs was working all right.

Q. They were working right along? A. Yes.

Q. But the other men temporarily ceased?

A. They temporarily ceased until we got another man.

Q. Do you know how soon after one o'clock it was that this accident [283] happened?

(Testimony of O. W. Pollow.)

A. Oh, I think it was right near two o'clock when this happened.

Q. Did you make any memorandum at the time in your log-book? A. Yes, sir.

Q. How soon afterwards did you make your memorandum in the log-book?

A. Oh, I got this memorandum at the purser's office.

Q. What time was it according to your log-book?

A. It is here as 2:15.

Q. State how close, as near as you can recollect at this time that was, that accident was to the entry in the log-book. In other words how soon after the accident did you make your entry?

A. Well, I should judge fifteen minutes.

Q. In fifteen minutes? A. Yes.

Q. What became of McHugh that night? Where did he eventually go to, I mean?

A. I phoned up to the doctor and the doctor told us to take him to the hospital, so I called a cab and took him to the hospital.

Q. Did you make your entry before or after he was sent to the hospital?

A. This was just after we got him into the cab.

Q. Did you accompany him to the hospital?

A. No, sir.

Q. And you made the entry immediately afterwards? A. Yes.

Mr. ROBERTSON.—I think that's all at this time.

Whereupon Court adjourned until Wednesday, March 28, 1923, at 10 o'clock A. M. [284]

(Testimony of O. W. Pollow.)

Wednesday, March 28, 1923.

Court met pursuant to adjournment at 10 A. M.

Mr. WICKERSHAM.—We desire the record to show that we give the counsel for the defendant a copy of our instructions, such as we have given to the Court.

Mr. ROBERTSON.—Also that the defendant reciprocates and gives the plaintiff a copy of its instructions.

Testimony of O. W. Pollow, for Defendant (Recalled).

O. W. POLLOW having been recalled on behalf of the defendant herein, was further examined in chief by Mr. Robertson and testified as follows:

Q. Mr. Pollow, did you have any occasion during that night or the early morning of March 9, 1922, to examine this particular coal tub about which you have testified?

A. Yes, about an hour after the accident.

Q. In what condition did you find the tub at that time?

A. Well, the lever on that trip, there was a mechanism up there on the tub where this lever works that was sprung so that the lever could work sideways away from the bucket.

Q. Now, when you say "mechanism," I wish you would explain that as carefully as you can go the jury, just what you mean by the term "mechanism," in that particular respect.

A. Well, it is where the, where the trip—the trip

(Testimony of O. W. Pollow.)

is on a bolt; swings on a bolt back and forth and the hook slips on a lever, goes back and forth and the becket is made fast on a little bolt on the bucket, and when the lever is pulled the other way (indicating) the hook comes off of that block (indicating), and where the hook is pivoted, there is a little frame there and this frame had been sprung so that the lever could swing sideways away from the bucket and [285] back to it and that allowed it to swing so far that it was less than a quarter of an inch that was holding on the block and it was easy to pull it off and I threw the bucket to one side so that they couldn't use it any more.

Q. How long was that after Mr. McHugh was hurt?

A. Well, I don't know exactly. It was about an hour.

Q. About an hour. Now, what, if any, effect or result would follow if a man handling the tub pulled or shoved by pulling on the bail itself—I mean on that particular tub, under those conditions?

A. Under those conditions, you would be apt to pull the hook and pull the bail down.

Q. Mr. Pollow, were you there when the first tub of coal that went up to the hopper was dumped, that you speak of, that was dumped?

A. In the afternoon, when we got in; yes, sir.

Q. How did that occur?

A. Well, when we first got in—the first thing we do, as a rule, when we want to dump into the hopper, we have to line up our booms and our gear so

(Testimony of O. W. Pollow.)

that the tub will, when it's up at the hopper, will hang directly over the hopper, so that when the bucket is tripped, it will dump into this hopper. The hopper is just an open-bottom box, about five feet square and they run their cars under this box and dump the bucket into the box, and it goes right through the box into the car and the car is wheeled into the warehouse and dumped, and in order to get things started right, we have to haul up an empty bucket over the hopper and see that it is aligned there in proper shape and then [286] haul the buckets up, and usually, and especially in this case, it was low tide when we got in and in hauling this bucket up, it took just all we could do to get the boom out over the dock far enough and get it high enough so that it would clear it so that the bucket would go over this hopper and the first bucket that went up, the winchman wasn't used to it yet and didn't get it clear of the hopper and he bumped it pretty hard and the bucket tripped.

It happens very often that the bucket trips that way.

Q. Now, then, Mr. Pollow, during the time that you were on watch, during the unloading of this cargo of coal, did any other bucket besides this one particular bucket spill coal?

A. Not to my knowledge on the dock, but—

Q. (Interrupting.) I mean to say, either on the dock or in the hold?

A. Very often in the hold, but they don't fasten that—

(Testimony of O. W. Pollow.)

Q. (Interrupting.) Well, just answer whether or not they did? A. Yes, sir.

Q. State whether or not it is a frequent or infrequent occurrence for a tub to spill coal?

A. Yes, sir, it is very frequent.

Q. Was this one tub the only tub that spilled any coal back into the hold as you were unloading the ship during that time while you were on shift?

A. Well, I couldn't say which tub was dumped, but they do dump and we don't pay much attention to it, because it is carelessness of the crew in not hooking that safety on. I don't know which tub was dumped.

Q. You don't know which tub was dumped?
[287] A. No, sir; I don't.

Q. Now, Mr. Pollow, yesterday noon, just after the Court took its noon recess, did you have occasion to see the plaintiff McHugh leave the courthouse? A. Yes, sir.

Q. What street did he go down as he left the courthouse?

A. He walked down the steps; went cater-corner across the street; went down the road.

Q. What kind of a road is that?

A. It's a rocky road.

Q. You heard him testify that as he went down the road, he followed the automobile tire track all the way down? A. Yes.

Q. What have you got to say about that?

A. There was another man with him and they both walked across the street, and the other man

(Testimony of O. W. Pollow.)

took the automobile track and he went alongside of him, on the outside.

Q. Was the place where he walked smooth?

A. No, sir, it was all pebbles.

Q. And how far could you see him go?

A. Why, I was standing on the steps here and I could see him till he got down on the bridge.

Q. Till he turned the corner? A. Yes, sir.

Q. And during a part of that time you were watching the man, who was standing by, near you, watching him?

A. Well, you come down the stairs.

Q. Anybody else? [288] A. And Mr. Ziegler.

Q. Anybody else? A. Mr. Wickersham.

Q. While this man was going down the road?

A. Yes, sir.

Q. That is McHugh? A. Yes, sir.

Mr. ROBERTSON.—I desire, if the Court please to have these illustrations, or plats and also the plat on this side (indicating), received in evidence for the purpose of illustration in connection with the witness' testimony.

The COURT.—You desire to offer them as evidence?

Mr. ROBERTSON.—I think so, so that they may go to the jury.

The COURT.—You will have to offer them in evidence and have them marked as exhibits.

Mr. ROBERTSON.—That's what I desire to do.

The COURT.—Any objection, Judge Wickersham?

(Testimony of O. W. Pollow.)

Mr. WICKERSHAM.—I don't like to waive it and I don't want to admit anything.

The COURT.—Well, they may be received.

Mr. WICKERSHAM.—I like to be courteous, but I don't want to waive any of my rights.

Whereupon a blue-print, showing cargo stowage plan of the steamer "Latouche," bearing the date of June, 1920 and file No. 722, and two sheets, containing pencil sketches showing coal bucket in different positions, were received in evidence and marked Defendant's Exhibits Nos. 1, 2, and 3 respectively.

Mr. ROBERTSON.—That's all.

Cross-examination.

(By Mr. WICKERSHAM.)

Q. Mr. Pollow, do you remember the first matter that was called [289] to your attention when you came on the witness-stand?

A. No, sir, I don't believe I do.

Q. Don't you remember that you were asked to look at this illustration made by one of our assistants and to say what was wrong about it?

A. Yes, sir.

Q. Do you remember what you said about it?

A. Yes, sir.

Q. What was the first objection you made to it?

A. Why, I said the trip was on the wrong side of the—

Q. (Interposing.) Of the bucket.

A. Of the bail; not the bucket.

Q. And of the bucket, too?

A. No, sir; I didn't say of the bucket.

(Testimony of O. W. Pollow.)

Q. On the wrong side of the bail was all you said?

A. Yes, sir.

Q. And you have it on the same side of the bucket as this? A. Yes, sir.

Q. Well, now, is it on this side or on the other side of the bucket?

A. It's on the right side of the bucket.

Q. It's on the right side of the bucket. And this is the right side of the bucket (indicating)?

A. Yes, sir.

Q. So there is no mistake about where it ought to be on the side of the bucket?

A. It's on the right side.

Q. Now, you were the mate in charge, you say, from twelve o'clock until four?

A. Yes, sir. [290]

Q. Twice a day? A. Yes, sir.

Q. From twelve o'clock noon to four o'clock in the afternoon and from twelve o'clock midnight to four o'clock in the morning? A. Yes, sir.

Q. So that you were not on watch on the eighth day of March, when this man worked because he began at noon—he began at seven o'clock.

A. I was not there at that time.

Q. You were not there. Do you know whether anybody gave him, or the men, instructions in the management of those buckets at that time?

A. Oh, I couldn't say.

Q. You don't know anything about that, do you?

A. No, sir.

Q. Now, when you came down there at one o'clock,

(Testimony of O. W. Pollow.)

did you give them any instructions? I mean—yes, it was one o'clock, after twelve, when you came on watch? A. Yes, sir.

Q. Now, Mr. Pollow, just tell us what you told them.

A. Well, they were having trouble in getting their buckets in place—

Q. (Interrupting.) Who was?

A. The men below, at different times, different ones.

Q. Yes.

A. And I told them to use the ropes to pull the bucket into place with.

Q. Is that all you told them? [291]

A. Practically. I might have told them other things that I don't remember, but I know I told them about the buckets.

Q. You told them to use these ropes and pull them into place? A. Yes, sir.

Q. You remember that distinctly? A. Yes, sir.

Q. You're positive about that, are you?

A. Yes, sir.

Q. You were down in the hold and told these men that? A. I was down in the hold.

Q. On the ninth day of March at one o'clock in the morning, or thereabouts? A. Yes, sir.

Q. You were down in the hold where they were using the buckets and shoveling into these buckets?

A. Yes, sir.

A. And you instructed these men in the management and use of the buckets? A. Yes, sir.

Q. How long did you stay down there?

(Testimony of O. W. Pollow.)

A. Oh, probably two minutes.

Q. Yes.

A. Three minutes. I was never in one place very long, because I have lots of work to do all over the ship.

Q. Did you see this plaintiff down there at that time? A. Not to know him.

Q. Did you examine that bucket at that time?

A. No, sir; not the first time I went down. [292]

Q. Not the first time? A. No.

Q. When did you examine that bucket?

A. About an hour after this man got hurt.

Q. Then you examined the bucket?

A. I examined the catch then, because they told me then.

Q. They told you then. Had you examined it especially before that time?

A. No, sir, I don't examine specially. Unless there is something wrong with them, it is not necessary.

Q. Mr. Pollow, I wish you would explain how large this catch or hole is through which they worked that coal. Tell how long it was and how wide, in that vessel that night.

A. I can't tell exactly, but it is about thirty feet long.

Q. About thirteen feet long?

A. Thirty feet long.

Q. Oh, about thirty feet long.

A. Yes; and about eighteen feet wide.

Q. About thirty feet long and about eighteen feet wide? A. Yes, sir.

(Testimony of O. W. Pollow.)

Q. Now, assuming that that is the size you mention— A. Yes, sir.

Q. Thirty feet long and about eighteen feet wide, where did these men begin taking out the coal? Where was the coal located with respect to that hatch, thirty feet long and eighteen feet wide?

A. The hatch was completely filled with coal.

Q. Completely filled with coal. A. Yes, sir.

Q. And where did they begin to take it out—at which end? [293] A. On the forward end of the hatch.

Q. On the forward end, over here (pointing)?

A. Yes, sir.

Q. And they worked back?

A. They worked right straight down there.

Q. Right straight down? A. Yes, sir.

Q. Now, at midnight, at one o'clock, at midnight, when you went on, on the night of the eighth and the morning of the ninth, what area of that hatch had they worked out?

A. They had worked about half of the hatch out and they were working forward under the hatch.

Q. They had worked about half of it out?

A. Yes, sir.

Q. Then, at that time this forward end or south end of the hatch was worked out? A. Yes, sir.

Q. And the other end had not yet been touched?

A. No, sir.

Q. And where did you say this plaintiff and his crew of three men were working?

A. Working in the port wing, next to the dock.

(Testimony of O. W. Pollow.)

Q. That is, they were working on this side, next to the dock? A. Yes, sir.

Q. You are sure about that now, are you?

A. Yes, sir.

Q. And where were the other crews working?

A. One was working right amidships.

Q. Right amidships, here (pointing)? [294]

A. Yes, sir.

Q. And the other?

A. The other one was working in the starboard wing.

Q. Over here (pointing)? A. Yes, sir.

Q. How far underneath?

A. Oh, probably at that particular time, there, they was probably fifteen feet, maybe more.

Q. Fifteen feet under the upper deck?

A. Fifteen feet under the upper deck.

Q. Back under here (pointing)? A. Yes, sir.

Q. How far back under the upper deck was the central crew? A. They were practically in line.

Q. They were practically in line?

A. All about the same.

Q. And all of them in line? A. Nearly.

Q. And this crew you think, here (pointing), where you say the plaintiff was working, was the same? A. Yes; oh, yes.

Q. How much coal was there left on the port and starboard sides of that hatch at that time?

A. Oh, I couldn't tell exactly.

Q. Well, I don't care to have it exactly. Assuming that that is the coaming of the hatch above.

A. Yes, sir.

(Testimony of O. W. Pollow.)

Q. How far from that coaming was the coal on the port and starboard sides? [295]

A. Oh, it was clear to the wings on both sides.

Q. Clear to the wings? A. Yes, sir.

Q. In other words, it was worked out on both sides clear to the side of the vessel? A. Yes, sir.

Q. And they had worked up this way, you think, twelve or fifteen feet? A. Yes, sir.

Q. And you are quite sure that this plaintiff and the two men working with him were working on the port side, next to the wharf? A. Yes, sir.

Q. Next to the dock. Where were you when he was hurt? A. I was on the dock.

Q. You was on the dock. You didn't see him hurt, then, of course?

A. I didn't see him get hurt; no, sir.

Q. How soon after that did you see him?

A. Oh, probably two or three minutes.

Q. Did you see any of these buckets brought out from under that hatch and hoisted?

A. Yes, sir; I helped to get them up.

Q. Before he was hurt, I mean.

A. Yes, sir; that is what I mean.

Q. They went to work at one o'clock?

A. Yes, sir.

Q. And he was hurt in about a half an hour after that?

A. Well, probably an hour after that. [296]

Q. Probably an hour after that? A. Yes, sir.

Q. Now, in the meantime had you been down in that hatch? A. Certainly.

(Testimony of O. W. Pollock.)

Q. And you had seen where he was at work, you think?

A. Well, at that time I didn't know where he was until he got hurt.

Q. Well, did you see him down there at any time when you knew who he was? A. No.

Q. You did not.

A. I didn't know who he was until he came out of the hatch.

Q. Now, when you say that he was working on the port or starboard side, how do you know that?

A. Because he came out of the hold hurt and I knew he must have been down there to get hurt.

Q. Oh, he came out of the hold, and he was hurt. But that isn't the question I'm asking you. I'm asking you, how do you know that he was working on the port side?

A. Because when I went down, these two men were waiting for another man to help them with the bucket.

Q. Is that the only way you know?

A. That's the only way I know.

Q. Didn't anybody else tell you anything about it? A. Why, certainly, the men told me.

Q. What did they tell you?

A. They told me that this man got hurt on this bucket.

Q. Did they tell you whether he was working on the port or starboard side? [297]

A. On the port side.

Q. Who told you that? A. Yes, sir.

(Testimony of O. W. Pollow.)

Q. You saw these men in court here on the witness-stand? A. Yes, sir.

Q. Which one of them told you that?

A. Oh, I couldn't tell you now, because I didn't pay any attention to the men, or which one—

Q. Are you sure it was either one of them?

A. Oh, I couldn't tell who they were. It was the two men that were on the bucket.

Q. These men down there, you say you think they told you he was working on the port side?

A. I know they told me.

Q. Where were you when they told you that?

A. I was down in this, down by the bucket.

Q. But that was after he had gone out?

A. Yes, sir.

Q. Then somebody told you that he was working on the port side.

A. The men that were working on that bucket told me.

Q. They told you? A. Yes, sir.

Q. Was it this native man that told you?

A. I couldn't tell whether it was or not. I wouldn't know one man from the other.

Q. Now, you examined this bucket, you say?

A. Yes, sir.

Q. How soon after he was hurt? [298]

A. About an hour.

Q. You went down there about an hour afterward and these two men were standing by the bucket, on the port side? A. No, sir.

Q. Well, just tell the jury exactly what you did say about that.

(Testimony of O. W. Pollow.)

A. Well, that time I got another man. I called up Pauze, the man on the dock that hires the men and told him a man got hurt and we wanted another man, so he sent another man down, and they went to work again.

Q. Yes.

A. And then about an hour after that the bucket fell again and I was standing right in the hold; I was standing in the hold when the bail fell down on a man's foot again; but I saw the man pulling on the bail—

Mr. WICKERSHAM.—I didn't ask you that. Read the question.

Mr. ROBERTSON.—I think that he ought to be permitted to answer.

The WITNESS.—I'm trying to tell what I done.

The COURT.—Just answer the question that you are asked.

The WITNESS.—I beg your pardon, your Honor; he asked me—

The COURT. (Interrupting.) Never mind. Just answer the question.

(Question repeated by reporter at request of Court.)

Mr. ROBERTSON.—What did Mr. Pollow say, you mean?

(Preceding question repeated by reporter at request of Court.)

Q. Just tell the jury what you did do, what you did say to these men when you went down there.

The COURT.—If you know.

Q. If you know. [299]

(Testimony of O. W. Pollow.)

A. I don't remember the exact words, what I said, but I told them to go ahead; I would get them another man.

Q. Yes. Did you examine the bucket then?

A. No, sir.

Q. Now at that time Barney had been hurt and had gone out? A. Yes, sir.

Q. When did you examine the bucket?

A. About an hour later.

Q. About an hour later. You say there was another man hurt in the meantime? A. Yes, sir.

Q. Now, after that you did examine the bucket?

A. Yes, sir.

Q. And what did you cause to be done with the bucket? A. I caused it to be put aside.

Q. Caused it to be put aside? A. Yes, sir.

Q. Now, when you examined that bucket, I wish you would just tell this jury now whether there were any ropes on it for the purpose of pulling the bucket with?

A. Yes, sir; there were ropes—one on each forward corner.

Q. And you think there were handholds there for the purpose of pulling the bucket?

A. I'm positive. They don't make them without.

Q. They don't make them without. And you are just as positive that the ropes were there?

A. Yes, sir.

Q. And the only thing that was the matter with the bucket was that the jigger, or the trigger was out of order, as you have described? [300]

A. The mechanism was—

(Testimony of O. W. Pollow.)

Q. (Interrupting.) As you have described?

A. Sprung; yes.

Q. Now, when did you give these instructions about the management of this bucket to these men, after twelve o'clock?

A. Oh, directly after twelve.

Q. Directly after twelve?

A. Or after one, rather.

Q. After one. You remember that very clearly, do you? A. Yes, sir.

Mr. WICKERSHAM.—I think that's all.

Redirect Examination.

(By Mr. ROBERTSON.)

Q. Who was Pauzi, that you called up?

A. Well, he's—he acts as longshore boss.

Q. Now, how did these other men get hurt that Judge Wickersham asked you about?

A. Well, they did the same thing.

Mr. WICKERSHAM.—I didn't ask him about that and I object to counsel going into that, if the Court please.

Mr. ROBERTSON.—Now, if the Court please, I'll ask Mr. Folta to read the question and answer.

Mr. WICKERSHAM.—Well, I'll withdraw my objection. Go ahead.

Q. Now, how did these other men get hurt, Mr. Pollow?

A. They were doing just what I had told them not to do—pulling on the bail, pulling backwards against the pile.

Q. Where were you?

(Testimony of O. W. Pollow.)

A. I was standing right on the coal pile, right in the opening of the hatch. [301]

Q. Now, then, how soon after McHugh came up out of the hold and you found out he was injured, did you say that you went down into the hold?

A. Probably fifteen minutes.

Q. What, if anything, what were the men doing at that time who had been working with him?

A. They were standing, waiting for another man. They didn't want to work until they got another man.

Q. Where were the other two buckets?

A. They were working.

Q. Whereabouts were they working?

A. One on the starboard side and one amidships.

Q. Which side was it that there was no bucket working on?

A. The port side.

Q. When a bucket is working with its crew of men, does it continue in one particular part of the ship, or does it go to a new part of the ship and work?

A. No, sir; they all have their place to work in. When their bucket is hauled up, they wait for it to come back; always work the same place with the same bucket.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

Testimony of H. C. Story, for Defendant.

H. C. STORY, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. State your name? A. Henry C. Story.

Q. What is your profession? [302]

A. Well, a physician.

Q. Where do you live? A. Ketchikan, Alaska.

Q. How long have you been a physician?

A. About 27 years.

Q. From what school did you graduate?

A. Jefferson School of Medicine, 1894.

Q. Have you been practicing your profession since? A. Yes, sir.

Q. I will ask you if you were practicing your profession at Ketchikan during the month of March, 1922? A. Yes, sir.

Q. Did you have occasion to treat Barney McHugh? A. Yes, sir.

Q. Will you state to the jury how you happened to treat him?

A. How I happened to treat him?

Q. Yes; how you came to treat him.

A. I was called in to treat him. He was taken over to the hospital. I made an examination. I thought he had a fracture—

Q. (Interrupting.) Just a moment. What time

(Testimony of H. C. Story.)

was it you came to him or that you called in to see him, if you recall?

A. I was called to see him. I guess it was some time in March, early part of March.

Q. What time of the day or night?

A. I don't just exactly recollect.

Q. You don't recall the exact time?

A. No, sir.

Q. When you came to him did you have a report of what had happened [303] to him, or did he tell you?

A. No; I made an examination—

Q. (Interrupting.) You made an examination of what? A. Of his foot.

Q. Of his foot.

A. And advised him to go over to Doctor Ellis' and have an X-ray taken, which he did.

Q. Did he do that? A. He did.

Q. I will ask you if you recognize that picture (handing picture to witness).

Mr. WICKERSHAM.—I would like to ask the witness a question, may it please the Court—if he was present when the picture was made?

A. No.

Mr. WICKERSHAM.—Well, then, I object to it, may it please the Court.

Mr. ZIEGLER.—I can follow that up.

The COURT.—Well, you haven't shown that he knows that this was the picture of the foot.

Mr. ZIEGLER.—Not yet.

(Testimony of H. C. Story.)

Q. You say that you had him go over to Doctor Ellis' ? A. Uh-huh.

Q. To have a picture taken of his foot?

A. Yes, sir.

Q. Did he do that? A. Yes, sir.

Q. Did you get the picture of his foot?

A. Yes, sir. [304]

Q. I will ask you to state whether or not the photograph you have is a photograph of his foot?

A. That's correct. It's a fracture of the metatarsal bone—

Mr. WICKERSHAM.—Now, wait a moment.

Q. Is that the photograph of his foot as given to you by the man who gave you the photograph?

A. I think so.

Mr. WICKERSHAM.—I object, if that is all the evidence he can give.

Q. Can you explain to the Court now, Doctor, just how that picture was taken?

Mr. WICKERSHAM.—Well, I object to that.

The COURT.—Yes.

Mr. WICKERSHAM.—He wasn't present when it was taken.

The COURT.—If he knows— Do you know how it was taken?

The WITNESS.—Well, your Honor—

The COURT. (Interrupting.) Answer. Do you know how it was taken?

The WITNESS.—I have an idea how it was taken.

The COURT.—Well, do you know?

(Testimony of H. C. Story.)

The WITNESS.—I wasn't there; of course not.

Mr. WICKERSHAM.—Well, then, I object to it, may it please the Court.

Q. All right. Did you have a picture taken, or order a picture taken of your patient's foot at the time? A. I did.

Q. Did you receive the picture? A. I did.

Q. Whom did you receive the picture from? [305]

A. The picture was put under a glass case, electric light, and shown to me, and I examined it through this light, as they always do an X-ray—

Mr. WICKERSHAM. (Interrupting.) Now, may it please the Court, I object to that. We're talking about the picture now.

Mr. ZIEGLER.—That is preliminary.

The WITNESS.—This picture.

Q. Now, Doctor, you examined the picture after it was taken?

A. Certainly; to find out, to ascertain where the fracture was.

Q. Now, I will ask you to state whether or not the picture that you have in your hand is the one you examined at the time?

A. I'm quite sure that it is, because it's the same kind of a fracture.

Mr. WICKERSHAM.—Now, I renew my objection, may it please the Court, because he hasn't connected himself with the making of the picture. He doesn't know who made it.

Mr. ZIEGLER.—Yes, he does.

The COURT.—Wait till he gets through.

Mr. WICKERSHAM.—He testified that he didn't. He wasn't there. He has merely said something about somebody who told him something about it. We object to it as hearsay.

The COURT.—Objection sustained.

Mr. ZIEGLER.—Well, Doctor Story doesn't have an X-ray machine and he doesn't take X-ray pictures, and, of course, he could not take the X-ray picture himself, but he has testified that he ordered the picture taken and that after it was taken, he looked at it under a glass and located the fracture, and that this is the picture that was taken and that it was exhibited to him by the man who took it. [306]

The COURT.—He says he doesn't know that that is the picture that was taken of the man's foot.

Mr. ZIEGLER.—Well, then, I'll ask him.

The COURT.—Wait a moment. The testimony doesn't show that he knows it was the picture taken of the man's foot. You are assuming something in this matter that you haven't connected up with the evidence.

Mr. ZIEGLER.—All right.

The COURT.—You are assuming that Doctor Story knows that this is the picture that was taken of the plaintiff's foot. He may have examined a picture which somebody else may have shown to him and taken it for a picture of the man's foot. But you are trying to prove that this

(Testimony of H. C. Story.)

is a picture of the man's foot and you have not connected it with the man's foot.

Q. Doctor, you had the picture taken, I think, you testified, under your direction?

A. Yes, sir.

Q. What was the purpose of having the picture taken?

Mr. WICKERSHAM.—We object to that.

The COURT.—Objection sustained. You have gone all over that before.

Mr. WICKERSHAM.—The only way they can prove that is by bringing the photographer here who took the picture. Counsel knows that.

Q. I will ask you, Doctor, whether or not you know that the picture that you have is the picture—

Mr. WICKERSHAM.—I object to that.

Mr. ZIEGLER.—I haven't finished, Judge.

Mr. WICKERSHAM.—Go ahead. [307]

Q. Doctor, I will ask you if you know that that is a picture of the plaintiff's foot, Barney McHugh's foot, at the time he entered the hospital?

Mr. WICKERSHAM.—I object now to that, because there is no basis for the doctor's answering that question except upon hearsay.

Mr. ZIEGLER.—Well, that's the question.

The COURT.—The Doctor can answer if he knows.

Mr. WICKERSHAM.—Let him say if he knows it then.

A. I don't know. There is only one way to answer that. An X-ray picture—

(Testimony of H. C. Story.)

The COURT. (Interrupting.) Answer that yes or not. Do you know that that is a picture of Barney McHugh's foot?

A. I have reason—

Mr. WICKERSHAM. (Interrupting.) Well, now, I object to that. He can answer yes or no.

A. Well, how can I answer that question? I wasn't there when the picture was taken.

Mr. WICKERSHAM.—I don't think you can.

The COURT.—You can answer it yes or no.

Q. Answer it yes or no.

A. Then, I'll say no; I can't say.

Q. You can't say whether that is the picture?

A. No.

Q. All right. Doctor, you state that you had a picture taken at that time?

Mr. WICKERSHAM.—No, he didn't; and I object to counsel's putting that into his mouth.

The COURT.—Objection sustained. [308]

Q. All right. You made an examination of his foot? A. Yes.

Q. Tell the jury what you discovered was wrong with his foot at that time?

A. I suspected a fracture.

Q. And did he have a fracture? A. He did.

Q. Just describe that fracture to the jury?

A. He had a fracture of the second metatarsal bone of the left foot.

Q. Of the left foot? A. Yes, sir.

Q. Now, after you ascertained that fact, just tell the jury the treatment that you gave the patient.

(Testimony of H. C. Story.)

is a picture of the man's foot and you have not connected it with the man's foot.

Q. Doctor, you had the picture taken, I think, you testified, under your direction?

A. Yes, sir.

Q. What was the purpose of having the picture taken?

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The COURT.—Objection sustained. You have gone all over that before.

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Mr. ZIEGLER.—I haven't finished, Judge.

Mr. WICKERSHAM.—Go ahead. [307]

Q. Doctor, I will ask you if you know that that is a picture of the plaintiff's foot, Barney McHugh's foot, at the time he entered the hospital?

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The COURT.—The Doctor can answer if he knows.

Mr. WICKERSHAM.—Let him say if he knows it then.

A. I don't know. There is only one way to answer that. An X-ray picture—

(Testimony of H. C. Story.)

The COURT. (Interrupting.) Answer that yes or not. Do you know that that is a picture of Barney McHugh's foot?

A. I have reason—

Mr. WICKERSHAM. (Interrupting.) Well, now, I object to that. He can answer yes or no.

A. Well, how can I answer that question? I wasn't there when the picture was taken.

Mr. WICKERSHAM.—I don't think you can.

The COURT.—You can answer it yes or no.

Q. Answer it yes or no.

A. Then, I'll say no; I can't say.

Q. You can't say whether that is the picture?

A. No.

Q. All right. Doctor, you state that you had a picture taken at that time?

Mr. WICKERSHAM.—No, he didn't; and I object to counsel's putting that into his mouth.

The COURT.—Objection sustained. [308]

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Q. Tell the jury what you discovered was wrong with his foot at that time?

A. I suspected a fracture.

Q. And did he have a fracture? A. He did.

Q. Just describe that fracture to the jury?

A. He had a fracture of the second metatarsal bone of the left foot.

Q. Of the left foot? A. Yes, sir.

Q. Now, after you ascertained that fact, just tell the jury the treatment that you gave the patient.

(Testimony of H. C. Story.)

A. I gave the treatment that is usually performed in cases of that kind—waited until the swelling subsided and let him immobilize the foot.

Q. You waited until the swelling subsided in the injured foot? A. Yes.

Q. Then you immobilized the foot or the fracture? A. Yes, sir.

Q. Explain that to the jury.

A. Immobilized it by putting it in a cast.

Q. What kind of a cast? A. Plaster case.

Q. Is that the usual method of treating a broken—

A. (Interrupting.) Yes, sir, it would be.

Q. (Continuing.) A broken bone?

A. Well, that depends altogether— On a bone like that, it would be; yes. [309]

Q. How long did that cast remain on the patient's foot?

A. Well, that accident happened some time during the first part of March, and he was discharged the 24th of April.

Q. Now, I will ask you, Doctor, if you knew the condition of his foot when he was discharged?

A. Yes, sir.

Q. Tell the jury what the condition was?

A. It was repaired.

Q. And by "repaired" what do you mean?

A. I mean it recovered from the fracture.

Q. State whether or not the bone that had been fractured had healed at that time?

A. It had.

(Testimony of H. C. Story.)

Q. How do you know that?

A. Well, you may not allow me to answer.

Q. Well, if it is not a proper answer, the Court will strike it out of the record and instruct the jury not to pay any attention to it, so you answer the question.

A. I had an X-ray taken of it.

Q. What did that reveal?

Mr. WICKERSHAM.—Well, now, may it please the Court. Is this the same X-ray that you have been talking about all the time, Doctor?

The WITNESS.—Not exactly the same one. The first one is of the fracture. The second one is of the recovery of the fracture.

Mr. WICKERSHAM.—Did you take the second one?

The WITNESS.—No, sir.

Mr. WICKERSHAM.—Were you present when it was taken?

The WITNESS.—No, sir. [310]

Mr. WICKERSHAM.—Well, now I renew my objection to any testimony with respect to that upon the same ground—mere hearsay.

Mr. ZIEGLER.—If the Court please, I think a physician should be permitted to answer as to a condition of that kind, as to the condition of a patient when he was discharged and as to how he arrived at that condition. Now, the Court realizes that not all physicians have X-ray machines and that they cannot be present when these pictures are taken and they have to take the word

of the man who took the picture of the foot to the effect that it is the same foot or broken member that was X-rayed. There is no way that he can tell other than to take his word for it. It's a good deal the same as the proposition as to who our fathers and mothers are. We have to take somebody's word for it. We have to take their word for it. It's hearsay, but we know it's true, just the same.

The COURT.—Well, he has already stated that it was healed and he stated how he knew it. He stated that he had an X-ray taken and that is how he knew. That is as far as the testimony has gone.

(Question repeated at request of Court by reporter.)

Mr. WICKERSHAM.—Now, we object to that, may it please the Court. I have asked him some preliminary questions to show that he wasn't present and that it is hearsay and he can't testify. Counsel can go and get this man that took the picture. It was taken, I assume, here in town.

Mr. ZIEGLER.—Well, if the Court please, I will tell Judge Wickersham and the Court that we have subpoenaed Doctor Ellis and sent a boat for him to the west coast of Prince [311] of Wales Island —

Mr. WICKERSHAM.—Well, I object to counsel's making this statement to the jury.

Mr. ZIEGLER.—Well, that is a fact.

The COURT.—Well, the jury will disregard all

(Testimony of H. C. Story.)

these arguments. He may state. Objection overruled. He may state what this X-ray picture revealed to him, but you can't offer any X-ray picture in evidence.

Q. What was the result, Doctor, of the pictures—what did the picture show that you had taken of the injured member?

A. Showed it healed; the fracture had been healed.

Q. State whether or not that was easily apparent or diff—

Mr. WICKERSHAM. (Interrupting.) Well, now, we object to that, may it please the Court.

The COURT.—The picture is the best evidence of that.

Q. All right. Now, Doctor, did you also make a personal examination at that time of the foot?

A. Oh, sure.

Q. What was the result of that examination?

A. Why, it showed that it was healed.

Q. Yes.

A. Recovery from the fracture.

Q. Now, after this personal examination and the X-ray picture, what did you do with reference to the patient?

A. Discharged him.

Q. And why did you discharge him?

A. Because he recovered. There was no necessity for any further hospital treatment.

Q. I will ask you if at that time there was any-

(Testimony of H. C. Story.)

thing wrong with [312] the first metatarsal bone of the foot?

A. No, sir; except that naturally there would be a little stiffness until he had exercised it. Outside of that there was nothing the matter with it.

Q. Now, just explain to the jury fully the condition of the patient when he was discharged from the hospital, with reference to the fracture and prior injured member.

A. Well, the fracture showed that it had healed and when he was discharged, he didn't require any foot treatment. He might possibly have a little stiffness in that foot which you would get from all fractures, but outside of that, he didn't require any physician's treatment.

Q. Now, with reference to that stiffness, was that usual or unusual in a broken bone of that kind?

A. That is usual.

Q. What would that stiffness be due to, if anything?

A. Well, from the fracture and the immobilization of the injured foot.

Q. Would the nonuse of the foot have anything to do with it?

A. Yes, sir; that would make a difference, too.

Q. How would that stiffness be removed in any normal case?

A. By proper exercise and judiciously using the foot carefully, you know, that would gradually wear off.

(Testimony of H. C. Story.)

Q. I will ask you if that was a normal case all the way through, Doctor?

Mr. WICKERSHAM.—Well, now— Well, go ahead. A. Huh?

Q. Was this a normal case? A. Yes. [313]

Q. In such a case as that, what, in your opinion, would be required, or what time would have been required for the patient to feel completely well?

A. Four or five weeks.

Q. Four or five weeks? A. Uh-huh.

Q. Now, Doctor, the patient never returned to you after he was discharged from the hospital?

A. No, sir.

Q. Assuming that he now complains of a soreness of the first metatarsal bone—

A. (Interrupting.) On the first metatarsal bone?

Q. First metatarsal bone.

A. I never doctored that.

Q. Well, now, assuming that he now complains of that, what, in your opinion, if anything, could have caused that condition to exist at the present time?

A. I have no idea. I had nothing to do with that. There was no occasion for any first metatarsal bone being injured at the time I treated him. I only treated him for the second metatarsal bone.

Q. Yes.

A. The record shows. If there was any injury to the first metatarsal bone, I have no recollection of that.

Q. I will ask you if there was a soreness there

(Testimony of H. C. Story.)

now, a swelling, as to whether or not, in your opinion that would be due to the original injury—

Mr. WICKERSHAM. (Interrupting.) Well—

Q. (Continuing.) Or something that occurred after his discharge by you?

Mr. WICKERSHAM.—I object to that because it is leading and [314] suggestive and because the doctor has already answered that he didn't know anything about it.

The COURT.—Objection overruled. He may answer.

A. What is your question?

(Question repeated by reporter at request of witness.)

Q. (Adding to question.) That is, on the first metatarsal bone? A. I don't think so.

Q. You don't think it is what? Do you understand the question, Doctor?

A. Yes, I understand the question. You wanted me to testify in regard to the first metatarsal bone?

Q. Yes.

A. Well, I never discovered any injury there. At the time that I had him under treatment, at the time I discharged him, I found no injury there.

Q And if it existed at the present time what, in your opinion, would it be due to; that is, with reference to whether it was due to the first injury, the original injury or something that occurred after his discharge from the hospital?

Mr. WICKERSHAM.—We renew our objection

(Testimony of H. C. Story.)

that it is leading and suggestive. That has already been answered once or twice.

The COURT.—Objection overruled. He can answer as to what his opinion is.

A. Well, I don't like to answer that question very well. It is a possibility, of course, that I might have overlooked a condition there in the first metatarsal bone that afterwards existed. It is possible. I don't claim to be infallible. There is a possibility of it, but so far as my judgment is concerned, I couldn't find any injury at the time I examined [315] him and at the time I discharged him.

Q. Well, if that condition existed at the present time, would you have an opinion as to what caused it to exist now?

A. Yes. What is your question as to that again?

Q. If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinion, would cause that to exist at this time?

The COURT.—That is a different question, entirely different question. Do you object?

Mr. WICKERSHAM.—I object; yes.

The COURT.—Objection sustained.

Q. Well, Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?

Mr. WICKERSHAM.—I repeat my objection.

(Testimony of H. C. Story.)

That is leading and suggestive and it has been answered two or three times. The doctor says he can't answer.

The COURT.—Objection sustained.

Q. Doctor, state whether or not, in your opinion, there was any injury to the first metatarsal bone at the time of his discharge from the hospital?

A. None that I discovered.

Q. Could that have been discovered if he had complained of it? A. Yes, sir.

Q. Did he complain of it? A. No, sir.

Q. Doctor, your services were paid for, for treating the patient? A. Yes, sir.

Q. By whom? [316]

A. The Alaska Steamship Company.

Mr. ZIEGLER.—If the Court please, I would like to have the first photograph that I offered, marked for identification, because I intend, when the witnesses get here, if they do arrive, before the case is concluded, to introduce it in evidence.

The COURT.—You may have it marked for identification.

Mr. ZIEGLER.—And I would like to make the offer of that photograph in evidence on the testimony already produced, with regard to this identification, by Doctor Story. Of course, the Court has ruled that it has not been properly identified, but I want to make the offer.

Mr. WICKERSHAM.—And we renew our objection because it has not been properly identified.

Mr. ZIEGLER.—And I also desire to offer in

(Testimony of H. C. Story.)

evidence a photograph which has been testified to here by Doctor Story. First I will ask Doctor Story a question.

Q. I will ask you if you had a photograph taken when the patient was discharged from the hospital?

A. Yes.

Q. Was that taken under the same circumstances as you have related with reference to the first photograph? A. Yes, sir.

Q. And do you know what that photograph is?

Mr. WICKERSHAM.—We object to the introduction or to any consideration of it for the same reason that we have objected to the other. The doctor wasn't present.

Mr. ZIEGLER.—I simply asked him the question if he knows what that photograph is.

The COURT.—Yes, he may answer. [317]

A. Why, yes; that is the—

Mr. WICKERSHAM. (Interrupting.) Well, that's the answer.

The COURT.—He said yes or no. Do you know what that photograph is?

The WITNESS.—Yes, sir.

Q. What is that photograph?

A. That is a photograph of the recovery of a fracture of the second, first metatarsal bone, second metatarsal bone.

Q. Of whose foot is it, if you know?

Mr. WICKERSHAM.—I object to that, may it please the Court, because he wasn't present and doesn't know anything about it.

(Testimony of H. C. Story.)

The COURT.—Well, he may answer.

A. Well, I can't state positively.

Q. You can't state positively? A. No.

Mr. ZIEGLER.—We would like to have the photograph marked for identification, if the Court please.

The COURT.—It may be marked for identification.

Mr. ZIEGLER.—We offer it in evidence, the same as the original photograph.

The COURT.—You object?

Mr. WICKERSHAM.—Yes.

The COURT.—Objection sustained.

Mr. ZIEGLER.—That's all.

Cross-examination.

(By Mr. WICKERSHAM.)

Q. Doctor Story, assuming that this plaintiff was injured at about, between one and two o'clock on the morning of March ninth, 1922, when were you called to see him first? [318]

A. Immediately afterwards, after the injury.

Q. That night?

A. No; I don't remember whether it was in the night-time. No; I think it was in the daytime, unless I am very much mistaken.

Q. Do you know what date it was?

A. It was on the eighth of March, so the hospital records have it. He entered the hospital on the eighth of March.

Q. And when did you call upon him?

A. Right away.

(Testimony of H. C. Story.)

Q. Do you remember whether it was that day or the next day?

A. The same day; the eighth of march.

Q. That is, the day following the night when he was hurt, whether it was the eighth or ninth?

A. I don't know when he was hurt. I thought he was hurt on the eighth. I presume that he was hurt on the eighth and sent up to the hospital and I treated him there.

Q. Well, you didn't call till the next day when the sun was shining?

A. I called on the eighth, whatever—I don't know what time he was injured. I don't know when he was brought there.

Q. You didn't call on him before he was injured?

A. Well, I know I didn't.

Q. Well, now, I said, assuming that he was injured between one and two o'clock on the morning of the ninth—

A. (Interrupting.) Judge, he wasn't injured on the ninth. He was injured on the eighth.

Q. Oh, he was?

A. Yes, he was injured on the eighth of March.

Q. You called on him in the daytime? [319]

A. Yes, sir.

Q. You didn't call on him that night?

A. No, sir.

Q. Now, how long did you care for him, Doctor?

A. I cared for him from the eighth of March until the 24th of April.

Q. Till the 24th of April? A. Yes, sir.

(Testimony of H. C. Story.)

Q. And he was discharged on the 24th of April?

A. Yes, sir.

Q. Now, was it the 24th or 22d?

A. 24th of April.

Q. You are quite sure about that?

A. Why, yes. It depends on my memory. I asked the records of the hospital.

Q. And he was discharged on the 24th?

A. Yes.

Q. You have never seen him since?

A. No, I don't think so.

Q. You say that the second metatarsal bone in his left foot was broken? A. Yes, sir.

Q. Wasn't it the second and third? A. What?

Q. Wasn't it the second and third?

A. The third, yes.

Q. Yes; the second and third. Now, when he was discharged on the 24th of April, Doctor, what shape was his foot in? A. Very good shape.

Q. Well, it was swollen? [320] A. No.

Q. Wasn't it swollen at all?

A. No; not particularly; no, it wasn't swollen.

Q. Was it black and blue? A. No.

Q. It wasn't? A. No.

Q. Nor was it swollen? A. No, sir.

Q. And you didn't discover anything the matter with the first metatarsal bone?

A. With what? No.

Q. I say, you didn't discover anything the matter with the first metatarsal bone?

(Testimony of H. C. Story.)

A. No; no; no; the first I heard it had been injured.

Q. This is the first you heard about it?

A. Yes, sir.

Q. You never gave him any attention for the first metatarsal bone of any kind? A. No, sir.

Q. What sort of examination did you make of the bones, Doctor? A. Usual examination.

Q. By feeling of them? A. Yes, sir.

Q. From that you judged that the first metatarsal bone was broken?

A. Well, Judge, I never depend on my diagnosis alone.

Q. You depend on other things?

A. When we have an X-ray, we depend on the X-ray. The X-ray demonstrates what kind of fracture it is and I depend on that. [321]

Q. And that first bone was not broken according to that? A. The first metatarsal bone?

Q. Yes. A. No, sir.

Q. Now, when you sent him out of the hospital on the 24th of April, you thought he was cured?

A. Yes, sir.

Q. Did he limp any when he went away?

A. Why, his foot was stiff yet, you know, naturally.

Q. Naturally he limped?

A. Oh, a little bit; yes, sure; always do that.

Q. How often did you call to see him when he was in the hospital here? A. Every day.

(Testimony of H. C. Story.)

Q. How long was he there before you put the cast on his foot?

A. Well, that is hard to say, because in the first place, I never put a cast on until the swelling has subsided sufficiently. It is not good surgery.

Q. You did not put that one on for about eight or ten days? A. Very likely.

Q. Yes. A. Yes.

Q. How long did it remain on? A. Which?

Q. The cast?

A. Well, assuming that I didn't put it on for eight days, that would be the 16th, and he was discharged on the 24th of April; so the case was on that length of time.

Q. You took the cast off on the 24th of April?

A. After an X-ray was taken. [322]

Q. You took the cast off before the X-ray was taken. A. I don't think so.

Q. Didn't you?

A. No, I think I had it taken afterwards.

Q. And he was immediately discharged?

A. Yes.

Q. What do you do when you discharge a patient from the hospital here? A. Beg your pardon.

Q. What do you do when you discharge a patient? Have you any formal method of discharging patients from the hospital here? A. No.

Q. Just tell him to go; he's finished? A. Yes.

Mr. WICKERSHAM.—That's all.

(Testimony of H. C. Story.)

Redirect Examination.

(By Mr. ZIEGLER.)

Mr. ZIEGLER.—If the Court please, the question that I desire to ask is perhaps more properly direct than it is redirect, and I ask the permission of the Court to ask it. I omitted to ask Doctor Story a question.

The COURT.—You may ask it.

Q. Doctor, assuming that Mr. McHugh's foot, where it was fractured, is by measurement all the way around his foot, approximately one-half an inch larger than the right foot, I will ask you to state whether or not that condition is usual or unusual where there has been a fracture?

A. A half an inch?

Q. Yes. [323]

A. With a small fracture like that?

Q. Yes.

A. Well, that is rather large, but it might possibly be.

Q. I will ask you if, where a bone is fractured in any of the limbs or the foot, whether or not after the healing has been finished, it is larger than it was before the injury? A. Yes.

Q. That is the usual condition for it to be larger?

A. Yes.

Q. And it varies in different fractures?

A. Yes; you take the foot for instance, or the leg, a fracture you know, there, you would have a shortening of the foot.

Q. And by measuring around the fracture, around

(Testimony of H. C. Story.)

the leg or the limb, would it be larger than it was normally or not? A. Yes; it would be larger.

Q. Would that same condition obtain in any other fracture? A. Yes, sir.

Q. Doctor, you saw Mr. McHugh in court here yesterday when Doctor Mustard was testifying?

A. Yes; I saw him.

Q. That so far as you know, is the only time you have seen him?

A. Well, I may have seen him, but he never came up—

Q. (Interrupting.) Well, you mean by that statement that he has never been to you for treatment?

A. No; I never treated him.

Q. You don't recall whether you saw him or not?

A. No.

Q. At the present time that's all.

Mr. WICKERSHAM.—That's all. [324]

Mr. ROBERTSON.—Under a stipulation or agreement made with counsel, we now offer to read certain parts of an affidavit.

The COURT.—Any objection?

Mr. WICKERSHAM.—No; I have no objection to the jury being excused, but I think I will have an objection to the testimony.

The COURT.—The jury may retire for a few minutes.

(Whereupon the jury retired.)

The COURT.—I understand that it is a part of the affidavit of Mr. Zeigler.

Mr. WICKERSHAM.—I just make the general

objection, may it please the Court, that it is incompetent, irrelevant and immaterial.

Mr. ROBERTSON.—I would also like to read at the same time the stipulation.

Mr. WICKERSHAM.—Well, I object to reading that.

Mr. ROBERTSON.—Then I ask the Court to instruct the jury that it is under the stipulation, just so the jury will realize that it is being put in as evidence.

The COURT.—I'll instruct the jury right now.

(Jury returns to box.)

Mr. ROBERTSON.—I now make an offer to read, if the Court please, from the affidavit of A. H. Zeigler, certain testimony that we contend the witness Alice McNutt would give if personally present, pursuant and under the stipulation which I will file in the case.

Mr. WICKERSHAM.—To that we make the objection which I have made already—that it is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. [325]

The COURT.—Gentlemen of the Jury: Counsel is about to read to you the statement contained in the affidavit for a continuance made last fall by Mr. Zeigler, as to what one, Alice McNutt, would testify to, to get a continuance of the case. Under the law, if the opposing counsel admits that an absent witness will testify to certain facts set forth in the affidavit, a continuance will not be granted on that ground alone. So, under that stipulation, Judge Wickersham, as counsel for defendant, ad-

mits that if Alice McNutt were present and testifying from the witness-stand, she would testify as set forth in the affidavit of Mr. Zeigler, which counsel is about to read to you.

Mr. ZEIGLER.—If the Court will pardon me, I think it should be stated that this witness has been subpoenaed for this trial, but in order not to have a continuance of this trial, Judge Wickersham stipulated that if she were here, she would testify so.

The COURT.—The said witness has been subpoenaed, but in order not to have a continuance of the trial, the stipulation was made that this affidavit may be read as the testimony of Alice McNutt which she would give if she were present.

Mr. ROBERTSON.—The part referred to is as follows: "That the witness, Alice McNutt, if present in court, would testify that she had been residing in Ketchikan, Alaska, since April 1, 1922; that during said time she knew the plaintiff, Bernard McHugh; that he lived in a cabin near her; that she often saw McHugh therein, as well as in her own house; that while he was around his house and in her own house, he never limped on the foot that he claimed has been permanently [326] injured; that he actually told her that he had to limp on it when he went down town, as he was going to get a piece of change from the company, meaning the defendant corporation; that it was difficult to always keep limping when walking about town, because he stated, 'My foot is just as good as any one's.'

"That on or about May 16, 1922, he was preparing to go to some camp to work, but changed his

mind and told her that he was able to work, but that he was going to get wages from the company all summer, and that he could also sell intoxicating liquor on the side, because he could keep up the limping, and the Chief of Police and the authorities would pity him and he could get by in that way."

The COURT.—Gentlemen of the Jury, I want to further instruct you that Judge Wickersham admits that if the witness were present, she would testify to that effect, but he does not admit that the statements made are true, but simply that she would so testify if she were present.

Testimony of Mons Halsor, for Defendant.

MONS HALSOR, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ZEIGLER.)

Q. You may state your name?

A. My name is Mons Halsor.

Q. Where do you live? A. Ketchikan.

Q. Have you been subpoenaed as a witness in this case, Mr. Halsor? [327] A. Yes.

Q. Where were you served with a subpoena?

A. At the Rush & Brown mine.

Q. What were you doing there?

A. I was working on the mine, outside of the mine there.

Q. What is your business; what kind of business do you follow? A. General work of any kind.

(Testimony of Mons Halsor.)

Q. General work. Laboring work? A. Yes.

Q. I will ask you if you have ever been know in Ketchikan by the name of Ole?

A. Well, I always go by that.

Q. You always go by that name? A. Yes, sir.

Q. In Ketchikan? A. Yes, sir.

Q. Were you living in Ketchikan during 1921, or any portion of that year? A. Yes.

Q. 1922?

A. That's last year. 19— well, I have been probably half of the time out at the Rush & Brown mine.

Q. Were you in Ketchikan the month of June?

A. Yes.

Q. 1922? A. Yes.

Q. Did you know Barney McHugh at that time?

A. Yes, sir.

Q. Where have you seen him before? [328]

A. I worked together with him at the Rush & Brown mine, 1921, before Christmas.

Q. You worked with him. Did you see Mr. McHugh in Ketchikan during that time in the month of June? A. Yes, sir.

Q. Did you see him before that time?

A. Yes, sir.

Q. Whereabouts?

A. I first see him when he go to the hospital. I went and visited him.

Q. You visited him in the hospital? A. Yes.

Q. And after he came out of the hospital, did you see him around town?

(Testimony of Mons Halsor.)

A. Yes, pretty near every day.

Q. Did he visit you in your cabin?

A. Yes, sir.

Q. How often?

A. Oh, pretty near every day, every other day and so on; twice a day.

Q. Explain to the jury where that cabin is situated and how you get up to that cabin?

A. The cabin belongs to Bill Ralson. It is behind Otto Inman's shop, boat shop, on the water-front.

Q. How do you get to that cabin?

A. Oh, a kind of crooked alley go down there, with poor sidewalks, holes in the planks; almost look pretty hard, looks pretty hard to go through there.

Q. Is there a stairway leading up to it?

A. There is a stairway goes up, but each side steps was broken out of it. [329]

Q. Steps were broken out? A. Yes.

Q. Was it easy or difficult to walk up those stairs?

A. Difficult.

Q. Mr. McHugh came and visited you in your house? A. Yes.

Mr. WICKERSHAM.—I object to the leading questions.

Q. State whether or not Mr. McHugh visited you?

A. Yes, he came and visited me pretty near every day; twice a day; sometimes at night.

Q. Now, during that time did he ever talk to you about his foot? A. Yes.

(Testimony of Mons Halsor.)

Q. Just tell the jury what he said?

A. He was drinking at the time and I told him he better be careful and not drink any, because it might not heal on him; his foot might not heal up, and he told me that it's getting well, pretty well along, and he tried to pick around so that he could get a piece of change out of the company.

Q. State whether or not during that time, Mr. McHugh was drinking?

A. Well, I met him on the street lots of times—

Mr. WICKERSHAM.—Well, I object to that statement. You can answer it yes or no.

The COURT.—Yes.

A. Yes; he was drinking.

Q. Just describe to the jury his condition when you saw him?

A. Why, I have met him on the street, and I can see that he was see-sawing along the street, especially at night, before twelve o'clock.

Q. In what part of town? [330]

A. In Indian town.

Q. Did you drink any with him? A. Yes.

Q. How much? A. Oh, quite a bit sometimes.

Q. Did he become intoxicated or not?

A. Yes; he got intoxicated; couldn't hardly talk lots of times.

Q. And that was during what month?

A. Month of, month of June.

Q. During the month of June?

A. Around the 20th.

Q. Now, how long did that keep up, Mr. Halsor?

(Testimony of Mons Halsor.)

A. Looked to me he kept it up until the middle of July, till I left Ketchikan.

Q. And you left the middle of July? A. Yes.

Q. Where did you go?

A. To the Rush & Brown mine.

Q. You went out there to work? A. Yes, sir.

Q. Have you been working there ever since?

A. I have been working until I was subpoenaed.

Mr. ZEIGLER.—That's all.

Cross-examination.

(By Mr. WICKERSHAM.)

Q. Ole, you're a friend of Barney's, aren't you?

A. Yes.

Q. Very dear friend? A. We used to.

Q. Used to. Visited with him frequently? [331]

A. Oh, sure.

Q. When he was sent to the hospital, you went to call on him? A. I did.

Q. And you were friends? A. Yes, sir.

Q. Do you know Hughie Gillis? A. No.

Q. You don't know him? A. No.

Q. Where were you last Friday evening, Ole, about eight or nine o'clock?

A. I don't know. I go out lots of times out in the street.

Q. Were you down at the Stedman Hotel Friday or Saturday evening?

A. I can't remember now. I don't think I was. I am not sure.

Q. You wouldn't be sure. Don't you know that

(Testimony of Mons Halsor.)

you were in the Stedman Hotel Friday or Saturday evening? A. I can't remember.

Q. Didn't you see Hughie Gillis there and talk to him? A. Where is he? Is he in here?

Q. That's the man there (pointing).

A. Oh, yes; that's the man.

Q. Did you see him there? A. Yes.

Q. And you sat there and talked with him quite a while, didn't you, Ole? A. Yes.

Q. Barney came in about that time, didn't he?

A. I didn't notice. [332]

Q. You didn't notice that Barney came in while you were sitting there, talking to Hughie?

A. I don't know. I didn't take notice of anybody.

Q. You didn't take notice of anybody else. Well, didn't you talk to Hughie, then and there, about Barney and this case?

A. Well, I don't think—I doubt it.

Q. You doubt it? A. I might.

Q. You might?

A. I might slip a few words, but I never had any thought of it.

Q. You haven't thought of it since. Well, now, didn't you say to Hughie Gillis at that time and at that place, you and Hughie Gillis being the only persons present, sitting there in those chairs—

A. (Interrupting.) Yes.

Q. (Continuing.) That you had it in for Barney? A. No.

(Testimony of Mons Halsor.)

Q. And that you were going to get even with him when this case came up?

A. I didn't; I didn't say anything of the kind.

Q. You didn't say anything of the kind.

A. I didn't mention any person. I didn't mention any personal names.

Q. Well, didn't you say that?

A. I didn't mention any personal names.

Q. You didn't?

A. I didn't mention any names.

Q. What? A. I didn't mention any names.

[333]

Q. Well, leave his name out. Did you say that about Barney's case and him?

A. No, I didn't mention anything against him or nothing. I never had anything against him.

Q. And didn't you, at the same time and place, you and Hughie being the only ones present, repeat this story that you have just told, about Barney's drinking?

A. I might have told him that on the street, you know. I might have told it on the street. I seen somebody on the street maybe.

Q. I am asking you if you didn't tell Hughie that there at that time? A. Not Barney; not Barney.

Q. You were talking to him, though?

A. Yes; talking to him, but not especially about Barney.

Q. Well, you were talking to him about Barney's drinking?

A. But he might have took it that way.

(Testimony of Mons Halsor.)

Q. He might have taken it that way.

A. He might have took it that way, but I never mentioned his name.

Q. You did not? A. No, sir.

Q. Didn't you, at that same time and place, you and Hughie being the only persons present, tell him that you had been engaged in bootlegging and that it was easy money, and that just as soon as you got some money that you thought you were going to get, you would take him into partners and you would go bootlegging together?

A. He urged me—

Q. Now, I ask you a question. Answer that question. [334]

The COURT.—Yes, or no. You answer it. Then you can explain.

A. I never promised him to go bootlegging with him.

The COURT.—Well, now, answer the question.

A. But he asked me to go bootlegging with him, but I—

Q. (Interrupting.) Oh, he did.

A. He asked me to go bootlegging with him and I said "No."

Q. You have been working over at the Rush & Brown Mine? A. Yes, sir.

Q. Barney and Hughie were over there at work at one time for a short time, weren't they?

A. Yes, sir.

Q. Both of them together? A. Both together.

Q. Do you belong to the I. W. W.?

(Testimony of Mons Halsor.)

A. I belong to the Socialist Party; used to stand for it.

Q. Don't you belong to the I. W. W.?

A. I am consequently—

Q. (Interrupting.) Say, yes or no.

A. No; I don't.

Mr. ROBERTSON.—I think that is immaterial.

Mr. WICKERSHAM.—I think it is very material.

A. I'm a Socialist in my ideas.

Q. And isn't it true that over at the Rush & Brown mine, in the presence of Barney and Hughie Gillis, that you told them that you belonged to the I. W. W., and that it was the only union and that you wound up at that time by denouncing the Government and the courts and everybody engaged in the administration of law— [335]

Mr. ROBERTSON. (Interrupting.) Just a moment, if the Court please. I object to that.

A. If I did—

The COURT. (Interrupting.) Wait a moment.

A. If I did—

Mr. ROBERTSON (Interrupting.) — Wait a moment. I object to that.

A. If I did.

Mr. ROBERTSON. (Interrupting.)—I object to it as being incompetent, irrelevant and immaterial and not cross-examination.

The COURT.—I don't see—

Mr. WICKERSHAM.—It's an impeaching question. I think we have a right under our statute to

(Testimony of Mons Halsor.)

show when a man has become so depraved as this man evidently is.

Mr. ROBERTSON.—Now, if the Court please, we certainly object to that kind of statement.

The COURT.—Yes.

Mr. ROBERTSON.—I want to object to that statement and request the Court to instruct the jury to disregard the statement of counsel.

The COURT. —The jury will be instructed to disregard it. I think that is entirely improper, Judge Wickersham.

Mr. WICKERSHAM.—I'll withdraw it and apologize to the Court. I didn't intend to say it in that language exactly.

The COURT.—I don't think it is material. If you can test him as to his veracity in any matter—

A. We was together once and he said—

Mr. ROBERTSON.—Wait a moment. [336]

The COURT.—I sustain the objection.

Mr. WICKERSHAM.—We take an exception, may it please the Court.

The COURT.—Yes.

Q. Have you been engaged in bootlegging yourself? A. No, sir.

Q. Didn't you tell Hughie Gillis that night, down at the Stedman, that you had been?

A. No, sir. Yes; for my own use.

Q. Oh, just for your own use?

A. For my own use.

Mr. WICKERSHAM.—That's all.

Mr. ZIEGLER.—I think that' all.

(Testimony of O. W. Pollow.)

If the Court please, there has been no return on the subpoena issued Monday morning for Doctor Ellis, from the west coast, and I anticipated that they would be in town yesterday. I have heard nothing from them, whether he is coming in obedience to the subpoena or not, and for that reason I take it that he may be in town to-day, and if the Court will let the case go over now until two o'clock, it may be that he will arrive in town. Of course, if he doesn't we can't ask for any further indulgence.

Mr. WICKERSHAM.—I won't make any objection. I think we ought to have fairness.

The COURT.—I think so too. Probably, I'll give you till later along in the afternoon.

Mr. WICKERSHAM.—I won't object to their putting him on any time before the case is concluded.

(Whereupon recess was taken until 2 P. M. this day.) [337]

2 o'clock P. M., March 28, 1923, Wednesday.

Court met pursuant to recess.

Mr. ROBERTSON.—I want to recall Mr. Pollow and ask one question.

The COURT.—You may.

**Testimony of O. W. Pollow, for Defendant
(Recalled).**

O. W. POLLOW, recalled as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Mr. Pollow, will you kindly state how far, or

(Testimony of O. W. Pollow.)

to what extent, the bail on this coal tub would clear the rear rim of the coal tub?

A. The bail in falling back?

A. Yes, sir; in falling backwards or in being moved back down over in its arc (illustrating), the bail being moved back over that way, due, of course, to the tub swinging up that way (indicating); how much clearance would there be between the bail and the rim of the tub? A. About six or eight inches.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—No questions.

Mr. ROBERTSON.—Defendant rests.

Whereupon the plaintiff, further to maintain the issues on his part, introduced the following evidence, to wit:

REBUTTAL.

Testimony of Hughie Gillis, for Plaintiff (Recalled in Rebuttal).

HUGHIE GILLIS, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows: [338]

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. Gillis, state your name, please?

A. Hughie Gillis.

Q. Where do you reside now?

A. At Hyder, Alaska.

Q. How do you happen to be here at Ketchikan at this time?

(Testimony of Hughie Gillis.)

A. I came up on the last boat from Hyder, as a Government witness.

Q. In another case? A. Yes, sir.

Q. When did you come?

A. I got into town about two o'clock last Thursday, I believe; two o'clock last Thursday.

Q. Are you engaged in any work at Hyder?

A. Yes, sir.

Q. Are you going back when your service is over here? A. I intend to; yes.

Q. Do you know this man Ole, or what is his name?

Mr. ZIEGLER.—Halsor.

Q. Mons Halsor? A. Who?

Q. Mons Halsor, who was on the witness-stand this morning? A. Yes, sir; but only by "Ole."

Q. Did you have occasion to meet him last Friday or Saturday evening at any time?

A. On Friday, I believe it was; Friday afternoon.

Q. Where? A. In the Stedman Hotel.

Q. Did you have any conversation with him there? [339] A. I did; yes.

Q. Who was present besides you and Ole?

A. Well, there was quite a few in the hotel and sitting room.

Q. Who was talking with you and Ole?

A. Just him and I alone.

Q. What time of the day was it, do you think?

A. It was in the afternoon, but I can't say exactly what time it was.

Q. Who else was there at that time, that you knew?

(Testimony of Hughie Gillis.)

A. Well, Barney McHugh was there.

Q. Yes.

A. He come in, and we were talking a little while.

Q. Was Barney talking to you and Ole?

A. No, sir.

Q. Now, if you had any conversation with Ole at that time about this case and about Barney McHugh, I wish you would state it.

Mr. ZIEGLER.—Just a moment, if the Court please. I don't think that is a proper question. He has asked the impeaching question of the witness Halsor on the stand.

The COURT.—Yes; objection sustained.

Q. At that time and place, you and Ole being alone and talking together, what did he say to you about getting even with Barney McHugh?

A. Well—

Q. Go ahead.

A. He said that he would get even with that dude the day of his trial in his case with the steamship company.

Q. Did he say anything else in relation to that matter? [340]

A. Well, yes; he told me the reason first. There was a grudge between them. He claimed that Barney McHugh stole five gallons of moonshine out of his cabin.

Q. And he was going to get even with him for it?

A. Exactly, them were the very words he said.

Q. What did you say in answer to that?

Mr. ROBERTSON.—That is immaterial, if the Court please.

(Testimony of Hughie Gillis.)

The COURT.—Yes.

Q. How long have you known Ole?

A. Well, I met him out at the Rush & Brown mine.

Q. When?

A. The last of the year 1921. I think it was just before Christmas.

Q. Who was with you when you met him there?

A. Well, Barney McHugh and others were there.

Q. Do you remember having any conversation with Ole there?

Mr. ZIEGLER.—Just a moment, if the Court please. We object to that, any conversation at that time, as incompetent, irrelevant and immaterial. Before this accident happened.

Mr. WICKERSHAM.—Well, it has reference to the other impeaching question I asked Ole.

Mr. ROBERTSON.—That question is not permitted. The Court ruled that out.

The COURT.—What is that?

Mr. WICKERSHAM.—In respect to his being a member of the I. W. W., and the other statement that I made, the other question that I asked at that time.

The COURT.—Yes.

Mr. WICKERSHAM.—We offer that for the purpose of impeachment. [341]

The COURT.—Objection sustained.

Mr. WICKERSHAM.—We desire to make the offer in the record, may it please the Court.

The COURT.—You may.

Mr. WICKERSHAM.—We offer to show by this

(Testimony of Hughie Gillis.)

witness and by Barney McHugh also, who has appeared as a witness, that at that time and place they were talking with this man and he was talking generally to people around him, and that he announced publicly that he was an I. W. W., and that it was the only union and the best union and then began a general denunciation of the Government of the United States and its officers. We offer to prove that by these two witnesses.

The COURT.—Offer denied.

Mr. WICKERSHAM.—We note an exception.

Mr. ZIEGLER.—Now, if the Court please, I think that the jury ought to be instructed that they are not to take that into consideration, because that opens up the question as to whether or not this man himself may not have been an I. W. W., and McHugh, and we—

The COURT. (Interrupting.) Just wait a moment. The jury will be properly instructed on that point when the time comes for so doing. I told you that this morning.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. How long have you known Ole?

A. Well, as I said, I knew him up at the mine there, during the time I was there. I think it was about two weeks, so far as I remember, and then I met him here a couple of times [342] you see, coming in, and after coming in from Hyder last week.

Q. You had not seen him any time between?

(Testimony of Hughie Gillis.)

A. I can't remember having seen him.

Q. Did you know him before you met him at the Rush & Brown mine?

A. I don't think I did. I don't remember having met him before.

Q. Did you know Barney McHugh before that?

A. I did; yes, sir.

Q. How long had you known Barney?

A. I think it was some time in September, 1920, that I first seen Barney.

Q. Did you live in Ketchikan at that time?

A. No; no.

Q. Do you personally know whether or not this statement that you say Ole made to you, was true?

A. Which statement?

Q. In which he said that, in which you said that he told you that Barney McHugh had stolen five gallons of moonshine. Do you know whether or not that was true that Barney McHugh did steal five gallons of moonshine from him?

A. I don't know anything about it, only Ole told me.

Q. You know nothing whatsoever about it?

A. No, sir.

Q. You have been an interested spectator at this trial since its commencement, haven't you?

A. I was here a while every day.

Q. And you are quite interested in seeing the outcome in Mr. McHugh's favor? [343]

A. I can't say that I am.

Q. And you have been during the entire trial of this case? A. I can't say that I am.

Q. You can't say that you are?

(Testimony of Hughie Gillis.)

A. No; I don't see why; I don't see why I should. McHugh isn't anything to me more than a slight acquaintance.

Q. McHugh is only a slight acquaintance?

A. Yes.

Q. And Ole is a still slighter acquaintance?

A. Yes; he is. There's hundreds of workmen that I am better acquainted with than Mr. McHugh.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

Testimony of J. H. Mustard, for Plaintiff (Recalled in Rebuttal).

J. H. MUSTARD, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Doctor Mustard, you have been sworn in this case? A. Yes, sir.

Q. When did the plaintiff in this case come to see you the first time about his foot?

A. About the middle of May.

Q. Last year? A. Last year.

Q. Please state to the court and jury the condition of his foot when you first saw it?

Mr. ROBERTSON.—Well, that is not proper rebuttal.

Mr. WICKERSHAM.—As to the appearance and general condition of his foot? [344]

Mr. ROBERTSON.—If the Court please, that is not proper rebuttal.

Mr. WICKERSHAM.—That is in rebuttal of Doctor Story's statement.

The COURT.—But he testified to that on his examination in chief. It is a part of your case in chief and the doctor testified to that—as to the condition of the foot when he first saw it.

Mr. WICKERSHAM.—We offer it, of course, in rebuttal of Doctor Story's statement or testimony.

The COURT.—I understand what your purpose is, but it is a part of your case in chief. Doctor Mustard testified to the condition of the foot when he first saw it.

Mr. WICKERSHAM.—Well, if it is in the record. My memory is that it doesn't show the facts that we have in contemplation now as to the discoloration.

The COURT.—Any objections to the reporter's reading it out?

Mr. ROBERTSON.—We think that this is going to be an endless proposition.

The COURT.—Why, certainly; I'm with you if you have any objection.

Mr. ROBERTSON.—Yes, sir; we object to it.

The COURT.—The jury will retire and it may be read to the court. What is your question, Judge Wickersham?

Mr. WICKERSHAM.—My question is as to the condition and appearance of his foot at the time he first examined it, about the 15th of May, 1922—the outside appearance of the foot.

Mr. ROBERTSON.—We object to that as not proper rebuttal.

(Testimony of J. H. Mustard.)

The COURT.—Objection overruled. It is with reference to [345] the outside appearance of the foot.

A. The foot was discolored somewhat and considerably swollen, the first time I saw it.

Q. To what extent was it discolored and where?

A. Oh, it was—when the shoe had been removed and the stocking and the foot remained on the floor for a few minutes, it was discolored a darkish red, whereas the other foot was not.

Q. How much of a swelling was there of the foot at that time?

A. I didn't take any measurements. There was a fair degree.

Q. Was it recent or apparently of some age?

A. The condition of the skin was a rather unhealthy condition. That is found after any fracture. As to whether the swelling was recent or not, I couldn't say from looking at it; that is a matter of deduction.

Q. You know the history of the case?

A. Yes, sir; slightly familiar with the case.

Q. Assuming that the cast had been taken off his foot on the 24th of April, was the foot in any different situation than you would have expected of that sort of operation at that time?

Mr. ROBERTSON.—We don't think there is a proper foundation laid for that, if the Court please. It seems to me you would have to first show that he knew the actual condition when the cast was taken off.

(Testimony of J. H. Mustard.)

The COURT.—Yes; I think so; and I don't think the doctor is in a position to say what the condition of the foot was when the cast was taken off.

Mr. WICKERSHAM.—All right.

Cross-examination.

(By Mr. ROBERTSON.) [346]

Q. The foot still has some discoloration?

A. Possibly some.

Q. I mean when you were noticing it yesterday?

A. It may have some.

Q. And the plates that you saw, doctor, state whether or not they showed a perfect healing of the fracture? A. Perfect; yes, sir.

Mr. ROBERTSON.—I think that's all.

Mr. WICKERSHAM.—That's all.

Testimony of John G. Young, for Plaintiff (Recalled in Rebuttal).

JOHN G. YOUNG, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. Young, referring to this bucket which came up from the hold of the steamer "Latouche" and which you testified was out of order on the night of March eight and ninth, 1922, state whether it had any beackets or ropes attached to it in any way for the purpose of pulling it?

Mr. ROBERTSON.—Now, if the Court please, that is not proper rebuttal. Mr. Young has already testified to that.

(Testimony of Harry Gillis.)

The COURT.—I'm inclined to think so.

Mr. WICKERSHAM.—Well, we offer to show that he will say that there were none on it, but if that is the Court's recollection, we will let it go at that.

The COURT.—Yes, he testified to that.

Mr. WICKERSHAM.—Well, I don't want to have any misunderstanding on the part of the Court as to what he did testify to. His testimony is in the record.

The COURT.—Objection sustained. [347]

Mr. WICKERSHAM.—We offer to show by this witness, that there were no ropes or beackets on the bucket at that time.

(Testimony of witness on examination in chief read by reporter.)

The COURT.—I don't think you can show that by his testimony, because he says he doesn't remember.

Testimony of Harry Gillis, for Plaintiff (Recalled in Rebuttal).

HARRY GILLIS, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM).

Q. Mr. Gillis, you were on the stand before?

A. Yes, sir.

Q. What time did you go to work on the night of March 8, 1922, in the hold of this boat.

(Testimony of Harry Gillis.)

A. It was about one; about one thirty.

Q. About one thirty?

A. Somewheres around there.

Q. Was any instruction given to you at that time, or at any time on that boat by Mr. Pollow, the mate, or by any other officer or any other person on the boat, in regard to the manner of handling these buckets? A. No, sir.

Mr. ROBERTSON.—We object to that as not proper rebuttal. This man has already testified to that on his case in chief.

The COURT.—Objection overruled.

A. No, sir.

Q. What is that? A. No, sir.

Q. Did you see him in the hold, giving any instructions about anything that night?

A. No, sir. [348]

Q. Was he there at any time giving any instructions while you were there, before Barney was hurt?

A. I wasn't there before Barney was hurt.

Q. I say, was he there at any time, giving any instructions, before he was hurt.

A. I don't know, I wasn't there.

Mr. ROBERTSON.—He wasn't there before Barney was hurt.

Q. But from the time you came there until—did you hear him give any instructions about the handling of these buckets? A. No, sir.

Mr. WICKERSHAM.—Now, we offer to show by this witness about the becket.

The COURT.—He has already testified to it in

(Testimony of Harry Gillis.)

the examination in chief. It's a part of your case in chief? It will be endless if I let this testimony go in. They cannot testify on the same subject back and forth.

Mr. WICKERSHAM.—Well, we will be very brief.

The COURT.—He has already testified to that plainly and repeatedly.

Q. Did you testify before which side of the hold Barney and his bucket crew were working on?

A. Yes, sir.

Q. You did testify to that?

A. Yes, sir; I think I did. I wouldn't swear to it, though, Judge.

The COURT.—Yes; he testified that it was on the starboard side.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.) [349]

Q. I understood you to say, then, that you didn't go to work until after Barney was hurt?

A. I didn't; absolutely not.

Q. And you weren't on the ship at that time?

A. No, sir.

Mr. ROBERTSON.—That's all.

Testimony of Frank Williams, for Plaintiff (Recalled in Rebuttal).

FRANK WILLIAMS, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. What time did you go to work in the hold of the steamer "Latouche" that night?

A. One o'clock after midnight.

Q. I will ask you then, if Mr. Pollow, the mate, or any other officer of the boat, or any one else gave you and the men who were working there, or any of you in the hold that night, any instructions about how to manage those buckets?

A. Not till after Barney McHugh got hurt.

Q. Not till after Barney was hurt?

A. Yes, sir.

Mr. WICKERSHAM.—We want to ask this witness the same question about the beckets. I don't know whether he testified to that or not before. What is the Court's memory?

The COURT.—I don't remember about this witness. I think he was asked the question on cross-examination. I'm inclined to think so.

Mr. WICKERSHAM.—We want to ask him the question then.

Q. Were there any ropes or attachments to handles on the *si* of the front of the bucket here (indicating) or anywhere [350] on the bucket

(Testimony of Frank Williams.)

for the purpose of managing the bucket or turning it or pulling it in any way?

Mr. ROBERTSON.—I object to that as leading and nor proper rebuttal. This witness testified on his case in chief, as to what his recollection of that was, if the Court please, and I will ask that my recollection of that be corroborated by the reporter's notes.

(Whereupon matter referred to was read by reporter from his notes.)

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. You didn't go to work until after one o'clock?

A. One o'clock after midnight.

Q. Pardon me?

A. One o'clock after midnnght.

Q. And the mate did give some instructions after Barney McHugh was hurt? A. Afterward; yes.

Q. You remember that quite distinctly?

A. Yes, sir; and he split us up on them two tubs.

Q. What?

A. He was laying the tub aside and he puts two, the two of us, one on each bucket, and that made four on to a bucket.

Mr. ROBERTSON.—That's all.

Testimony of Alvin Sodaberg, for Plaintiff (Recalled in Rebuttal).

ALVIN SODABERG, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Judge WICKERSHAM.) [351]

Q. Mr. Sodaberg, when did you go to work that night? A. At one o'clock.

Q. At one o'clock? A. Yes.

Q. Did this mate, Mr. Pollow, at any time, or any officer of the boat, or any other person, give you or the men there engaged in that work any instructions that night or at any time with respect to handling those buckets? A. No, sir.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Didn't give any instructions at all that night? A. Not as to how to handle the buckets.

Q. Never said a word about it at all?

A. No, sir.

Mr. ROBERTSON.—That's all.

Testimony of Bernard McHugh, for Plaintiff (Recalled in Rebuttal).

BERNARD McHUGH, the plaintiff herein, upon being recalled, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. What time did you get to work that night on the "Latouche"? A. Seven o'clock.

Q. Seven o'clock in the evening?

A. In the evening.

Q. Did this mate, Mr. Pollow, or any other officer of the boat then, or at any time, before you were hurt at about one o'clock give you or the men in your presence, any instructions [352] with respect to handling these, with respect to the manner of handling these tubs?

A. There was no instructions given to me or the men in the hold during the working hours that I worked aboard the boat.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Do you hear pretty well now, Barney?

Mr. WICKERSHAM.—Well, now, we object to that. He asked Barney all about his hearing before, eyesight and everything else.

Mr. ROBERTSON.—All right.

Mr. WICKERSHAM.—Now, may it please the

Court, I want to introduce in evidence the original answer in this case.

Mr. ROBERTSON.—We object to it as incompetent, irrelevant and immaterial.

Mr. WICKERSHAM.—Oh, I think it is material.

The COURT.—It may be received in evidence.

Whereupon defendant's original answer herein was received and marked in evidence Plaintiff's Exhibit —, which said exhibit is in words and figures as follows, to wit:

Plaintiff's Exhibit —.

“In the District Court for the District of Alaska.
Division Number One at Juneau.

No. 2212-A.—(566-KA).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation,
tion,

Defendant.

ANSWER.

Comes now defendant and, for answer to the complaint herein, admits, denies and alleges:

I.

Defendant admits paragraph I of the complaint.

II.

Defendant admits that on or about the 8th day of March, 1922, at Ketchikan, Alaska, plaintiff was employed by defendant as a stevedore or longshoreman in unloading coal from the Steamship ‘La-touche,’ which vessel was then owned and being

operated by defendant; and the defendant denies each and every other [353] allegation contained in paragraph II of said complaint.

III.

Defendant denies paragraph III of said complaint.

IV.

Defendant denies paragraph IV of said complaint.

V.

Defendant denies paragraph V of said complaint.

AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the territory of Alaska, and that it has paid its annual corporation license tax last due to said territory.

II.

That on or about March 8th, 1922, defendant employed plaintiff together with and as a member of a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship 'Latouche' on to a dock or wharf at the port of Ketchikan, Alaska; that all of said stevedores and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal from vessels on to docks and wharves at said port, and were then

and there fellow-servants of each other and of plaintiff and engaged in the same common and general employment, i. e.: unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform said work, according to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.: Tongass Narrows, in the territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with coal tubs and other appliances, in safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that, while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the danger likely to result therefrom, voluntarily, carelessly and negligently and while aboard said vessel sought to and did move a certain tub, that was used to carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as they then and there well knew was customary, proper and safe, moving said tub forward by pulling on the beekets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that said plaintiff and his said fellow-servants by their said

shoving on said tub forced the body of said tub forward and caused the handle with which said tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward under the forward impetus so given to the body of said tub by the said negligent shoving of plaintiff and his said fellow-servants; and that said careless, voluntary and negligent acts aforesaid of said plaintiff and of his said fellow-servants, so committed by them with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by the defendant. [354]

AND AS A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said territory.

II.

That on or about March 8, 1922, the plaintiff, being then and there a man of full age and experi-

ence in the unloading and discharging of coal and freight from vessels on to docks and wharves at the Port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such work and of work on or about steamships while unloading and discharging coal, was employed by the defendant together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the defendant's steamship 'LaTouche' at said port; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.; Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter, while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub, with which plaintiff was then and there thoroughly conversant and with which he had then and theretofore been doing said work without any complaint or objection to its condition, although he was then and there entirely familiar with such appliances and with the methods of their use, and which tub was used to

carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as he then and there well knew was customary, proper and safe, moving and assisting to move said tub by pulling on the beackets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that plaintiff by his said shoving and assisting to shove said tub forward from the rear caused, as plaintiff then and there well knew was likely to result, the handle with which said tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward under the forward impetus so given to the body of said tub by the said negligent shoving and assistance in shoving of plaintiff; and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had assumed said risks and dangers and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by the defendant.

WHEREFORE defendant prays that it may go hence without day, and that plaintiff recover nothing by this action, and that defendant have judg-

ment against plaintiff for its costs and disbursements herein incurred.

(Signed) A. H. ZIEGLER,

(Signed) R. E. ROBERTSON,

Attorneys for Defendant. [355]

United States of America,
Territory of Alaska,—ss.

Willis E. Nowell, being first duly sworn on oath, deposes and says: That he is a resident of the Territory of Alaska, over the age of 21 years, and agent of the corporation defendant; that he has read the foregoing answer, and knows the contents thereof, and that the same is true as he verily believes; that the reason he makes this verification is that there is no president, vice-president or other acting head of said corporate defendant now in or a resident of said territory.

(Signed) WILLIS E. NOWELL.

Subscribed and sworn to before me this 27th day of October, 1922.

(Signed) R. E. ROBERTSON,

Notary Public for Alaska.

My commission expires June 20, 1925.

Copy of the within answer received this 27th day of October, 1922.

WICKERSHAM & KEHOE,

Of Counsel for Plaintiff."

Filed Oct. 27, 1922.

Mr. WICKERSHAM.—I understand, then, from what the Court said when this matter was up before,

that I may also refer to the answer and to the affidavit of Mr. Robertson?

The COURT.—Yes, I think so.

Mr. WICKERSHAM.—That is our case, then. We rest.

Recess until 4 P. M. this day, March 28, 1923.

4 P. M., March 28, 1923.

Court met pursuant to recess.

Upon statement of counsel for defendant that Doctor Ellis had not arrived and no response had been received from him, an adjournment was taken until 10 o'clock A. M., March 29, 1923.

Thursday, March 29, A. D. 1923.

Court met pursuant to adjournment at 10 o'clock A. M.

Mr. ROBERTSON.—I desire, if the Court please, at this time to present a few supplemental instructions on behalf of the defendant, and I will give the counsel for plaintiff a copy of those.

I may also say, if the Court please, that the witness whom we have been expecting and for whom the Court continued the case until this morning, has not arrived, and under the circumstances of the case, we will not ask for further time. We would like to know whether or not counsel is willing to agree that the pictures may go—

Mr. WICKERSHAM.—No; they may be presented to the jury for what they are [356] worth.

The COURT.—Mark them as exhibits in the case under the stipulation of counsel.

Mr. ROBERTSON.—With that, we rest, if the Court please. We desire at this time, if the Court

please, to present and file our motion for a directed verdict for the defendant in this case; which said motion is in words as follows, to wit:

“Comes now the defendant and respectfully moves the Court that the jury be directed to return a verdict herein for the defendant and against the plaintiff, for the reason that neither the law nor the evidence adduced at the trial of the above-entitled action is sufficient to support or warrant a verdict or judgment for the plaintiff in any sum whatsoever.”

The COURT.—Motion will be denied.

Mr. ROBERTSON.—We take an exception.

Thereupon defendant presented in writing and filed its requested instruction No. 1, to wit:

“I instruct you that in law the plaintiff is not without fault, if it appears from the evidence that by the exercise of any care and caution which was, under the circumstances, reasonable, practicable and available, he might have avoided the injury charged.”

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 2, to wit:

“I instruct you that it is the duty of an employee to exercise ordinary and reasonable care in the protection of himself in the performance of his work and if he does not do so, and his want of care contributes in any degree, however slight, to any injury to himself, then he is guilty of contributory negligence, and cannot recover

damages from his employer, even though the employer was negligent. If you find, from a preponderance of the evidence, that the plaintiff McHugh, in his work about, or in pulling on the rear rim of, the coal tub in the manner that he did, did not exercise what was reasonable prudence and care under the circumstances, and that his want of care contributed to the happening of the injury complained of, then your verdict must be for the defendant, Alaska Steamship Company."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested [357] instruction No. 3, to wit:

"I instruct you that contributory negligence is the want of ordinary care on the part of the party injured; that is to say, it is not the want of such care as an unusually prudent person would take, but the want of such care as an ordinarily prudent person would exercise under the same or similar circumstances, which, either by itself or concurring with the negligence of the defendant, if any, proximately causes the injury."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 5, to wit:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff

took hold of the rear rim of the coal tub in question and pulled or shoved thereon, and that when he did so he knew that the bail of said coal tub, if it should fall, could only fall toward the rear and not toward the front of said tub, and that he could have taken hold of said tub by the rim forward of the bail thereon, or by handles attached to the lip of the tub, or beekets attached to said handles, instead of taking hold of said tub by the rear rim thereof, and that by so doing he could have moved the tub in safety, and that he took hold of the said rear rim of said tub and pulling or shoving thereon was a dangerous way of moving said tub, and that to take hold of the rim of said tub forward of the bail or by handles or beekets attached to said handles on the lip of said tub was a safe way of moving said tub, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work, in such case the jury will find for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 6, to wit:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff was directed in moving the coal tub on which he was working to move the same forward with its lip or nose in a forward position, and to so move it forward by pulling on the handles or

beckets attached to said handles on the lip of said tub, if you find there were any such handles or beekets, or by taking hold of said tub forward of the bail, and you further find that such was a safe way to move said tub, and that it had been done, the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, moved said tub either by pulling or shoving on the rear rim, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and in such case you should find for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 7, to wit:
[358]

"I instruct you that if you believe that plaintiff was injured by reason of the bail of the coal tub falling against or upon his foot, and if you find that the condition of said tub including the bail thereof and the trigger or catch, was open and obvious to plaintiff, and considering his age and intelligence, he should and ought to have known the danger, if any, confronting him in the use of said tub, and if you find from a preponderance of the evidence that the plaintiff, considering the circumstances surrounding him at the time, was not exercising such care and prudence in undertaking to do the work at which he was engaged that would or should

ordinarily be exercised by a person of like age and intelligence of plaintiff under similar circumstances, then plaintiff cannot recover, even though the plaintiff at the time was working pursuant to instructions of the defendant, if you should so find."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 8, to wit:

"I instruct you that if you find that the plaintiff was injured by reason of the bail of the coal tub in question falling upon or against him, and if you find from a preponderance of the evidence that the condition and manner in which said bail was operated and held in place and released was open and obvious to plaintiff, and if you find from a preponderance of the evidence that plaintiff was of sufficient intelligence to comprehend and know, and ought to have known, considering his age and intelligence, the danger, if any, surrounding him, then plaintiff cannot recover anything in this case even if the defendant company was at fault and negligent in allowing said coal tub to be used by the plaintiff or in permitting the trigger or catch on the bail thereof to be out of order, if you find by the preponderance of the evidence that such is the fact and in such case you will render your verdict for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 10, to wit:

“I instruct you further that an employee who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promises to remedy the defect; and in the event that the master does so promise, the servant may, by relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and if you believe in this case that the tub with which the plaintiff was working, that the trigger or catch holding the bail in place thereon was defective, and that the defendant company promised to remedy the same but failed to do so within a reasonable time after such promise, and that McHugh continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such an event, I instruct you that McHugh [359] assumed the addi-

tional risk of the defect, if any, in said tub, and you will return a verdict for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 12, to wit:

"You are instructed that if McHugh engaged with the Alaska Steamship Company in the work of unloading or assisting to unload coal from the steamship 'Latouche' without at the time fully understanding or comprehending the dangers incident to such work, yet if you find that between the time of his employment and the time he was injured he learned of those dangers, if any, or in the course of his employment ought to have known of the liability to accident by being hit by the bail of the coal tub if the same should fall, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the Alaska Steamship Company."

Thereupon the Court refused to give said instruction, to which refusal defendant duly objected.

Thereupon the defendant presented in writing and filed its requested instruction No. 16, to wit:

"You are instructed that the Alaska Steamship Company is not responsible for the negligence of McHugh's fellow-servants, if the jury believes from the evidence that plaintiff's fellow-servants were guilty of negligence, and that such negligence caused the accident by which

plaintiff claims to have been injured. The term 'fellow-servants' as used in these instructions means those who were engaged with the plaintiff in the same work, without any relation to each other, except as co-laborers, and without rank."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 17, to wit:

"You are instructed in this case that if you find from the preponderance of the evidence that the injury which McHugh claims to have suffered was caused by the negligence of his fellow-servants, that is, if his fellow-servants so negligently handled, moved, pulled or shoved the coal tub with or about which McHugh was working, so as to cause the bail or handle thereof to fall and strike McHugh and to cause said injury, then your verdict should be for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its supplemental requested instruction No. 1, to wit: [360]

"I instruct you that negligence is defined as being the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

And in this case you cannot find a verdict for the plaintiff McHugh in any amount whatsoever unless you first find by a preponderance of the evidence that the injury, if any, sustained by him and the damages, if any, incurring to him by reason thereof, were the result of negligence, as hereinbefore defined, of the defendant Alaska Steamship Company, or its officers, agents, or employees, or by reason of some defect or insufficiency due to its or their negligence, as hereinbefore defined, in the coal tub or bucket with which said plaintiff McHugh claims to have been working.

In this behalf, I instruct you that the mere occurrence of the injury, or of the damage complained of, if you find by a preponderance of the evidence that the plaintiff McHugh did sustain said injury and damages, is no evidence of negligence on the part of the defendant Alaska Steamship Company or of any of its officers, agents or employees or that the existence of a defect or insufficiency if you so find, in said coal tub or bucket was due to its or their negligence; and I further instruct you that the burden is on the plaintiff McHugh to show, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence, as hereinbefore defined, which proximately caused the injury and damage. The plaintiff McHugh has the burden of proving, by a preponderance of the evidence,

that the defendant Alaska Steamship Company was guilty of negligence.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly excepted.

Thereupon defendant presented in writing and filed its supplemental requested instruction No. 3, to wit:

“I instruct you that the mere fact that you find from a preponderance of the evidence that the bail of the coal tub on or about which McHugh claims to have been working fell upon or came in contact with his foot and injured it as claimed by him and that he suffers damages therefrom as contended by him, is no evidence of negligence on the part of the defendant Alaska Steamship Company or any of its officers, agents or employees or that the defect, if you find by a preponderance of the evidence that there was a defect, in said tub or bucket was due to its or their negligence, but the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company was guilty of negligence which proximately caused said, if any, injury, and said, if any, damages, that is to say, the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company or its officers, agents or employees failed to observe, for the protection of said McHugh while he was working on said vessel ‘Latouche’ on March 9, 1922, that degree

of care, precaution and vigilance which the circumstances in connection with said work justly demanded, and that by reason thereof said McHugh suffered said injury and damages.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly excepted.

Thereupon defendant presented in writing and filed its supplemental requested instruction No. 4, to wit: [361]

“I instruct you that in this case even though you should find the defendant Alaska Steamship Company guilty of negligence from a preponderance of the evidence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been permanently injured for the reason that there is no evidence in this case that said McHugh has been permanently injured.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly objected.

Thereupon defendant presented in writing and filed its supplemental instruction No. 5, to wit:

“I instruct you that in this case even though you should find from a preponderance of the evidence the defendant Alaska Steamship Company guilty of negligence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been perma-

nently incapacitated for the reason that there is no evidence in this case that said McHugh has been permanently incapacitated in his earning power.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly objected.

Thereupon defendant presented in writing and filed its supplemental instruction No. 6, to wit:

“I instruct you that you cannot find the defendant Alaska Steamship Company guilty of negligence in this case unless you find from a preponderance of the evidence that it had knowledge of the defect, if any, in the coal tub or bucket being used by McHugh or that it should have, in the exercise of ordinary care, acquired such knowledge. I instruct you that it is a rule of law that the master is not usually liable for latent defects, nor is he liable for defects arising so short a time prior to the accident, if any, as not to have been discovered by him in the course of his reasonable inspections. In this case the Alaska Steamship Company is known as the ‘master,’ and the plaintiff is known as the ‘servant.’ ”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly objected.

And thereupon plaintiff, by his counsel, submitted his argument in chief to the jury, and thereafter defendant, by its counsel, submitted its argument to the jury, and thereupon plaintiff, by his counsel,

submitted his argument on rebuttal to the jury, and in said argument on rebuttal by plaintiff's said counsel, the said counsel made the following statement, to wit:

"Now, both attorneys talked about Barney's drinking and being on a spree, and they said that this damage to his foot might have been produced that way. Well, it might have been produced in a thousand different ways. But it wasn't! Doctor Mustard swore to you men positively—and there was nobody brought here to question him. They didn't even ask Doctor Story about it—Doctor Mustard swore positively that that foot was injured at the same time that the other [362] two bones were broken by that big, round iron nub which struck the bone, sunk in and broke it and bruised the foot."

And thereupon defendant, by its counsel, R. E. Robertson, made the following objection and motion:

"I object to that statement and ask to have it stricken from the record. Doctor Mustard didn't testify that way."

and thereupon the Court made the following ruling:

"The motion will be denied. The jury know what Doctor Mustard testified to and the jury will be instructed not to take any notice of statements of counsel which are not borne out by the evidence."

And thereafter, upon the conclusion of the re-

spective arguments, the Court instructed the jury as follows:

Instructions of Court to the Jury.

Gentlemen of the jury: Counsel have concluded their arguments and it now becomes my duty to instruct you as to the law in the case. Counsel for plaintiff has asked that the instructions be given to you in writing, so the instructions will be given to you accordingly. Some of the instructions, however, will be read to you from instructions presented to the Court by counsel on either side. [363] in addition to those of the Court, a copy of which will be given you. Those instructions which are crossed out you should pay no attention to, and where you will find on the margin of certain proposed instructions the words "not given," you will pay no attention to such proposed instructions, because the Court does not consider such instructions applicable to the case or belonging to the law of the case, or because such instructions have been covered by the instructions already given by the Court.

In this case the plaintiff, Bernard McHugh, is suing the defendant, the Alaska Steamship Company, for damages in the sum of \$10,000, for an injury to his person, alleged to have occurred through the negligence of the defendant company in failing to provide him with a safe place to work and also safe appliances with which to work. The defendant, while denying any negligence on its part, alleges that such an injury, if plaintiff received

any, arose from the danger and risk which the plaintiff assumed, and also that the injury, if any received by the plaintiff, was caused by his own contributory negligence.

The plaintiff, in his complaint, alleges, in paragraph one, that at all times mentioned in the complaint and for a long time prior thereto the defendant was and at all times since the injury complained of therein, has been, and now is, a corporation organized and existing under the laws of the State of Nevada, and was at all such times and now is, engaged in business as a common carrier of freight in the coastwise carrying trade, in the waters of Alaska, and within the jurisdiction of the Court.

He further states, in paragraph 2 of his complaint, that [364] on the eighth day of March, 1922, at Ketchikan, Alaska, within the jurisdiction of this Court he, the plaintiff was employed by the defendant, the Alaska Steamship Company, as a stevedore in assisting other of defendant's employees to unload coal from the steamship "Latouche," which said steamship was then owned and being operated by the said defendant; that in the course of his said employment the plaintiff was ordered by the defendant, and was engaged by it, to shovel coal, in the hold of said steamship into a certain iron bucket then in the hold of said vessel and furnished by the defendant for that purpose, and in pulling said bucket on the floor of said hold to the point thereon where it could be filled by plaintiff and the other employees of the defendant in said hold; that said iron bucket was a large and heavy

appliance and required the united efforts of three men to so pull it to the point where it could be so filled with coal; and was so constructed with a large and heavy handle held in place by an iron trigger; and that it was then so worn and in an unsafe and dangerous condition from long wear and hard usage as to be a dangerous and unsafe appliance for such work, all of which was well known to the defendant; that while the plaintiff, with two other employees of the defendant at said time and place was so engaged in pulling the said large iron bucket on the floor of the said hold to the point needed for loading, the said defective and worn trigger thereon became and was loosed and caused the heavy iron handle of the said heavy iron bucket to loosen and fall, and the said heavy iron handle did, without any fault or negligence of the plaintiff, become loose and did fall upon the plaintiff's foot and did strike plaintiff's foot on and across the instep thereof, and did break and crush the bones and tendons, muscle and flesh of the said foot [365] crippling the plaintiff for life; that the plaintiff was thereby so injured in his said foot and in his health and nervous system that he was thereafter in the hospital under medical treatment for many weeks and suffered and now suffers great pain, and was ever since and now is unable to walk or work at his labor as a stevedore, or to do any work of any kind; that plaintiff thereby suffered great pain and a permanent injury to his said foot and general health and was thereby compelled to suspend all his labors and thereby suffered the loss

of wages from said March 8, 1922, to the date of his complaint, being the 26th day of July, 1922, that he will not be able to work for months yet to come and is crippled and injured therein and thereby permanently in said foot, and that plaintiff was so injured in the sum of Ten Thousand Dollars.

Plaintiff further alleges, in paragraph 3 of his complaint that the defendant well knew that said appliance by which the plaintiff was injured was unsafe and dangerous, but that it wilfully and negligently neglected, omitted and refused to keep it in a state of repair or replace it with a safe and proper appliance, and thereby caused the injury to this plaintiff, as aforesaid.

Plaintiff further alleges, in paragraph 4 of his complaint, that he had no knowledge or means of finding out the condition of said iron bucket and the parts thereof, as aforesaid; that the light in the hold was dim and plaintiff could not see the bucket plainly; that he was then and now is a common laboring man, without knowledge of the mechanism of said bucket or its parts, and was by reason of his inexperience and the darkness unable to discover the defects in the said appliances; that it [366] was then the duty of the defendant to furnish the plaintiff a safe and proper bucket and appliance for use in said work, but that the defendant negligently and carelessly failed and refused to so furnish such safe and proper bucket and appliances for such work, or a well-lighted place to work in, whereby, because of the negligence and carelessness of the defendant, the plaintiff was so injured and crippled

and was so made to suffer great bodily pains and anguish and was so injured in a permanent way and caused to be and remain in the hospital and in his room, and rendered unable to work for a long time, whereby he lost his wages and paid large sums for support, all to the plaintiff's damage in the said sum of Ten Thousand Dollars.

Plaintiff further alleges, in paragraph 5 of his complaint, that at the time of his said injury as aforesaid, and prior thereto, he was a strong, healthy and vigorous laboring man of the age of 38 years, capable of and was earning six and one-half dollars a day, and had long engaged in said work and labor at first-class wages, but that on account of such injury, plaintiff's earning capacity was wholly destroyed for the period from the date of said injury to the date of signing the complaint in this case, on July 26, 1922, and was permanently reduced by one-half or more for life, all to his damage in the sum of Ten Thousand Dollars.

Plaintiff then asks for a judgment against the defendant in the sum of Ten Thousand Dollars and for his costs and disbursements in this action.

I.

In the first paragraph of defendant's amended answer, it [367] admits paragraph one of plaintiff's complaint; that is to say, that at all the times mentioned in the complaint and for a long time prior thereto the defendant was, and at all times since the injury complained of therein, has been and now is a corporation organized and existing under the laws of the State of Nevada, and was at

all such times and now is engaged in business as a common carrier of freight in the coastwise carrying trade in the waters of Alaska and within the jurisdiction of this Court.

In the second paragraph of its answer, defendant admits that on or about the 8th day of March, 1922, at Ketchikan, Alaska, plaintiff was employed by defendant as a stevedore or longshoreman in unloading coal from the steamship "Latouche," which vessel was then owned and being operated by defendant; but the defendant denies each and every other allegation contained in paragraph two of said complaint. The defendant also denies all of paragraphs three, four and five of said complaint.

And as a further, separate and first affirmative defense, the defendant alleges, first, that the defendant is now, and at all the times thereafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Nevada, and engaged in and authorized to engage in, the business of common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory; second; that on or about March 8, 1922, defendant employed plaintiff together with, and as a member of, a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship "Latouche" onto a dock or wharf at the port of Ketchikan, Alaska; that all of said stevedores [368] and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal

from vessels onto docks and wharves at said port, and were then and there fellow-servants of each other and of plaintiff and engaged in the same common and general employment; that is, unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform said work, according to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean; that is, Tongas Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with coal tubs and other appliances, in a safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the dangers likely to result therefrom, voluntarily, carelessly and negligently, and while aboard said vessel, sought to and did move a certain tub that was used to carry coal in and out of the hold of said vessel, by pulling said tub backwards instead of, as they then and there well knew was customary, proper and safe, moving said tub by pulling on the beekets with which for that purpose said tub was provided and by which said tub could have been safely moved,

and that said plaintiff and his said fellow-servants, by their pulling on said tub, did move [369] said tub backwards and caused the handle with which said tub was provided to fall towards them, and that plaintiff, in so negligently pulling said tub backwards, was struck by said handle as it so fell; and that said careless, voluntary and negligent acts aforesaid of the said plaintiff and of his said fellow-servants so committed by them, with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no case caused by the defendant.

And as a further, separate and second affirmative defense defendant alleges, first, that the defendant is now, and at all the times thereafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in, and authorized to engage in the business of a common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory; second, that on or about March 8, 1922, the plaintiff being then and there a man of full age and experienced in the unloading and discharging of coal and freight from the vessels on to docks and wharves at the port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such

work and of work on and about steamships while unloading and discharging coal, was employed by defendant, together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the [370] defendant's steamship "La-touche" at said port; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean; that is, Tongass Narrows, in the Territory of Alaska, and was then and there made fast, by lines or ropes, to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter, while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub with which plaintiff was then and there thoroughly conversant, and with which he had then and theretofore been doing said work without any complaint or objections to its condition, although he was then and there entirely familiar with such appliances and with the methods of their use, and which tub was used to carry coal in and out of the hold of said vessel, by pulling said tub backwards instead of, as

he then and there well knew was customary, proper and safe, moving and assisting to move said tub by pulling on the beekets with which, for that purpose, said tub was provided, and by which said tub could have been safely moved, and that plaintiff, by his said pulling and assisting to move said tub backwards, caused, as plaintiff then and there well knew, was likely to result, the handle with which the tub was provided to fall toward him; and plaintiff, being so negligently pulling said tub backwards, was struck by said handle as it was falling; [371] and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by defendant. And the defendant prays that plaintiff recover nothing by this action and that the defendant have judgment against plaintiff for its costs and disbursements herein incurred.

II.

For reply to the allegations in the first and second affirmative defenses in the defendant's answer, the plaintiff admits the allegations in paragraph

one of each of said defenses; that defendant is now, and at all times thereafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier, in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory; and for reply to the second paragraph in the defendant's first and second affirmative defenses the plaintiff admits that on the 8th day of March, 1922, the plaintiff was employed by the defendant as a longshoreman in the unloading and discharging of coal from the defendant's steamship "Latouche" on to a dock or wharf at the port of Ketchikan, [372] Alaska; admits that at that time plaintiff was of the age of 38 years; admits that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to the said dock and wharf by lines; admits that while at said work he was injured as alleged in his complaint herein and not otherwise, and denies each and every other allegation in said first and second affirmative defenses contained.

III.

You are instructed that this action is brought by the plaintiff against the defendant to recover against it a judgment for \$10,000 for injury to his person alleged to have been caused to the plaintiff while he was employed by the defendant and

engaged in unloading and discharging coal from the defendant's vessel the "Latouche," at Ketchikan, Alaska, on March 8, 1922, and which injury is alleged to have been caused by and through the negligence of the defendant company in failing to provide at the time and place for such work a reasonably safe place in which to work and reasonably safe and adequate appliances with which to perform the services required to be performed there, whereby, for the want of such reasonably safe place to work and reasonably safe and adequate appliances, the plaintiff was injured.

IV.

The defendant alleges that the place where the plaintiff claims to have been so injured was a reasonably safe place in which to work and the appliances so furnished with which to do such work were safe and adequate and sufficient, and that the injury, if any, was caused by the negligence of [373] the plaintiff and those engaged in assisting him in such work at the time of the alleged injury, and not by or through any fault or negligence of the defendant.

V.

The defendant also alleges that at the time and place of the alleged injury, the plaintiff was of full age and an experienced man in the performance of the work of so unloading and discharging such coal from the said vessel and knowingly assumed the risks and dangers incident thereto, and voluntarily and carelessly and with gross negli-

gence on his part, moved and assisted in moving the coal tub used in such work by pulling it backward instead of pulling with the beackets provided on the tub for that purpose on the other side, well knowing that the custom in such work was to pull said tub by the beackets, instead of pulling it backwards, whereby, from his own carelessness he was so injured, and not from any fault or carelessness of the defendant.

VII.

The Court instructs you that some of the alleged facts in the pleadings in this case are admitted by the parties and may, therefore, be accepted by you as established in the case. These admitted facts are, first, that at all the times mentioned in the pleadings herein and for a long time prior thereto, the defendant was, and at all the times since the injury complained of, has been and now is a corporation organized and existing under and by virtue of the laws of the State of Nevada, and was at all such times and now is engaged in business as a common [374] carrier of freight in the coastwise carrying trade in the waters of Alaska and within the jurisdiction of the Court; and it is further admitted that on the eighth day of March, 1922, at Ketchikan, Alaska, the plaintiff was employed by the defendant as a stevedore or longshoreman, in unloading coal from the steamer "Latouche," which vessel was then owned and being operated by defendant.

It is also an admitted fact that on the eighth day of March, 1922, the plaintiff was employed

by the defendant as longshoreman in the unloading and discharging of coal from defendant's steamship "Latouche" and on to a dock or wharf at the port of Ketchikan, Alaska; that at that time plaintiff was of full age and that the said vessel was then and there lying in the tidal waters of the North Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to said dock or wharf by lines.

It is further admitted that while at said work, plaintiff was struck by the bail of the bucket falling.

These facts alleged on the one side and admitted on the other, must be accepted by you as established facts in the case, and, having been formally established by the pleadings, it will be your duty to treat them as facts without considering any evidence relative thereto. Your duty is to consider the testimony in this case with reference to facts alleged on the one side and denied on the other, which constitute the issues in the case. Your findings on these facts, taken together with the established facts and the law as given you in these instructions, are the basis upon which you should determine your verdict in this case. [375]

VII.

You are instructed that the defendant, the Alaska Steamship Company, admits in its answer in this case that the plaintiff herein was one of its employees engaged by it in unloading and discharging coal out of its steamship, the "Latouche," onto the dock or wharf at Ketchikan, Alaska, on

March 8, 1922, and also on that day and at all times since that day the said Alaska Steamship Company, defendant herein, was and now is a common carrier engaged in trade and commerce in the Territory of Alaska.

VIII.

You are instructed that every common carrier engaged in trade or commerce in the Territory of Alaska, shall be and is liable to any of its employees for all damages which may result from the negligence of any of its officers, agents, or employees or by reason of any defect or insufficiency due to its negligence in its cars, appliances and machinery; and you are also instructed that in all actions brought against any common carrier to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery by the employee where his contributory negligence was slight and that of the employer was gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

IX.

You are further instructed that in this case the defendant, the Alaska Steamship Company, is liable to the plaintiff for all [376] damages which may have resulted to him from the negligence of the defendant or by reason of any defect or insufficiency due to its negligence in its appliances,

machinery, ways or works causing the injury to his person, if any, so alleged to have been received by him on March 8, 1922, while so employed by the defendant in unloading and discharging coal from defendant's steamship, the "Latouche," onto the wharf or dock at Ketchikan, Alaska.

X.

If you should find from the evidence, however, that the plaintiff was guilty of any contributory negligence in causing the injury complained of, you are instructed that such contributory negligence shall not bar a recovery by him in this case, where his contributory negligence was slight and that of the defendant was gross in comparison. If you should find that the plaintiff was guilty of contributory negligence at the time of the alleged injury, it would then be your duty to determine from the evidence in the case whether his contributory negligence was slight in comparison with that of the defendant, and to diminish the damages, if any, to be allowed to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and of the defendant, and to return a verdict accordingly.

XI.

You are instructed that no person shall recover damages from a common carrier under the laws in force in Alaska for personal injury to himself, where the injury was done by his own [377] consent, or was caused by his own negligence, without any negligence on the part of the defendant; but where the plaintiff and defendant are both at fault,

the plaintiff may still recover, provided he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee.

XII.

You are instructed that you cannot find a verdict for the plaintiff until it is proved to your satisfaction, by a fair preponderance of the evidence that the plaintiff was injured as alleged in his complaint and that the injury was caused by the negligence of defendant as alleged in the complaint.

XIII.

You are instructed that negligence is the failure to do something that a person of reasonable care and prudence would have done, or the doing of something that a person of reasonable care and prudence would not have done under the circumstances. It is want of due care in the particular situation. Due care and negligence are relative terms, and what in one situation might be due care might be negligence in another, and the measure of duty always is reasonable care and caution on the part of an employer for the safety of his employees, and that care should be proportioned always to the danger reasonably to be apprehended from the employment in which the servant is engaged.

XIV.

The jury are instructed that contributory negligence is the negligent act of a plaintiff which, concurring and co-operating [378] with the neg-

ligent act of a defendant, is the proximate cause of the injury. If you shall find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat recovery altogether, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of himself and the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.

XV.

The statute under which this suit is brought makes the defendant liable to the plaintiff for all injuries suffered by the plaintiff because of its negligence, or that of any of its officers, agents or other employees. Therefore, as a matter of law, the negligence of any officer, agent or employee of the defendant, other than the negligence of the plaintiff himself, is the negligence of the defendant, for which it would be liable.

XVI.

The plaintiff in this case alleges that the injury he suffered, if any, was caused by the negligence of the defendant in failing to furnish a safe and

well-lighted place for him to work in, and safe appliances and equipment with which to work, [379] whereby he was injured.

On this branch of the case, the Court instructs you that an employer does not guarantee the absolute safety of the place where the employee works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employee to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant or employee does not undertake to incur the risks arising from the negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendant and its officers, agents and employees in charge of the work on the steamship "Latouche" at the time of the injury to plaintiff, resulting from the employment of the plaintiff as a laborer in such work, to exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find by a fair preponderance of the evidence that the plaintiff was so injured on the defendant's steamship "Latouche" on March 8, 1922, while so unloading and discharging coal therefrom, and that the place where he was required to work was dark and badly lighted, and that condition of the light prevented the plaintiff from dis-

covering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff. [380]

XVII.

The Court further instructs the jury that it was the duty of the defendant steamship company, its officers, agents and employees having charge of the work in which plaintiff was engaged when he was so injured, to furnish to the plaintiff who was in its employ, such tools, appliances, tubs and other instrumentalities as were reasonably safe for the purpose for which they were used; and the Court instructs the jury that if they believed from a fair preponderance of the evidence in this case, that the defendant steamship company or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which it knew to be defective, or which its officers, agents, or employees whose duty it was to superintend the plaintiff's work, knew to be defective, or which, by the exercise of reasonable diligence the defendant or its officers, agents or employees superintending said work might have known to be defective and liable to drop the handle of the said iron bucket when so being used in said work, and that in consequence of said defect the plaintiff, while exercising ordinary care, was injured while in the performance of his duties, then the jury should find a verdict for the plaintiff.

XVIII.

You are further instructed that if you believe from the evidence in this case, that the iron tub or bucket used by the plaintiff at the time of receiving the injury complained of, was reasonably safe and suitable for the plaintiff to use in the performance of his duties, then its use was not a negligence of the defendant and plaintiff cannot recover because of its use. [381]

XIX.

One of the defenses in this case is that the plaintiff, being of full age and experienced in the work of unloading and discharging coal from a steamship on to a wharf or dock at Ketchikan, Alaska, assumed the risks of the employment and cannot recover for that reason.

On that branch of the case the jury are instructed that the plaintiff assumed only the risks of injury which were ordinarily incident to the employment in which he was engaged; and you are further instructed, in this connection, that by the use of the expression "a risk ordinarily incident to the employment" is meant a risk of injury that does not arise or grow out of any act of negligence on the part of the defendant or its servants, and that whenever a risk is created by an act of negligence on the part of a steamship company operating as a common carrier, or its employees, this is not a risk ordinarily incident to the employment; and if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than

his own negligence, if any, this would not be a risk which he assumed as incident to his employment.

191½.

I instruct you that when an employee assumes the ordinary risks of employment, he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty, to provide suitable appliances and a safe place to work, and he does not assume any risk of the employer's negligence in performing such duty. However, where a defect is known to an employee or is so patent as to be readily observed by him, he [382] cannot continue to use the defective appliance in the face of knowledge and without objection without himself assuming the hazard incident to such situation. If a defect is so palpably observable that the servant may be presumed to know of its existence and he continues in the employer's employ without objection, he is said to have made his election to thus continue, notwithstanding the employer's neglect, and in such case he cannot recover.

XX.

You are instructed that if the plaintiff knew or was of such age, apparent intelligence and experience and maturity of judgment that he should have known of the danger incurred by him while working with the bucket in the defective condition testified to, if you believe from the evidence that the bucket so operated by the plaintiff was defective, he took upon himself and assumed all the patent and obvious risks incident to his employment; and if the danger and risk of the bails falling because of any

defect therein, while the bucket was being hauled by him in the hold of the vessel, was obvious and could have been readily observed by a person possessing average intelligence and judgment by the ordinary exercise of his senses, then the plaintiff assumed the risk thereof and cannot recover.

20½.

There is this difference between the defense of contributory negligence and that of assumption of risk. Contributory negligence is the omission of the employee to use those precautions for his own safety which ordinary prudence requires; while assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur [383] an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects.

The jury, in the cause of defense of contributory negligence, should compare the negligence of the parties, if any shown, and such defense is not a bar to plaintiff's recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages should be diminished by the jury in proportion to the amount of the employee's negligence.

If the jury, on the other hand, find that the plaintiff assumed the risk of his employment under the

instruction I have given you, then such finding would be a bar to plaintiff's recovery and your verdict should be for defendant.

XXI.

The jury is instructed that if you shall find a verdict for the plaintiff in this case, it will be your duty to assess the damages which he has sustained, not to exceed the sum of Ten Thousand Dollars demanded in his complaint. The damages, if any, in this case, cannot be exemplary; that is given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint [384] also the condition of his health and physical ability to labor, before the accident complained of, as compared with the present condition thereof and how far the injury is probably permanent in its character and results, as well as the mental and physical suffering he has suffered, if any, by reason of the injury; and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate result of the accident, not to exceed the amount demanded in the complaint.

XXII.

You are further instructed that you are the judges of the effect and value of all evidence ad-

dressed to you, except when it is declared by the Court in these instructions to be conclusive; but you are instructed that your power of judging the effect of evidence is not an arbitrary power but one to be exercised by you with legal discretion and in subordination to the rules of evidence and in accordance with these instructions.

You are instructed that you are not bound to find a verdict in this case in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

You are instructed that a witness wilfully false in one part of his testimony may be distrusted in others, and if you believe that any witness in this case has wilfully testified falsely in one part of his testimony, you may distrust him in other parts thereof and you should not find a verdict for either party based on such false testimony. [385]

XXIII.

You are further instructed that in civil cases, and this is a civil case, the affirmative of the issue shall be proved by the party alleging it, and when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

XXIV.

You are further instructed that evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, you are instructed that if weaker

and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

XXV.

You are further instructed that you are the sole judges of the credibility of witnesses and of the weight that shall be given to their testimony. With that the Court has nothing to do. You may judge of the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against the parties to the action, or any circumstances tending to shed light upon the truth or falsity of such testimony; and it is for you at last to say what weight you will give to the testimony of any and all witnesses.

XXVI.

Finally, you are instructed that in deliberating upon a [386] verdict, you are not to be influenced by sympathy or by prejudice for or against either party to the action. Your verdict should be based upon the evidence admitted for your consideration and upon the law governing this case, as given to you by the Court. Any prejudice or sympathy or feeling for or against either party should be wholly disregarded and you should base your verdict upon the evidence and the instructions of the Court alone. You have no right to consider anything in this case except the evidence admitted

by the Court. Any evidence offered or questions asked, to which objections were sustained, you are not to consider for any purpose. Neither should you pay any attention to statements of attorneys in offers of testimony which were not admitted, or in arguments or otherwise, which are not based on founded upon the testimony admitted in the case.

XXVII.

I instruct you that the defendant company is not an insurer of the safety of its employees, and is only bound to use ordinary care to protect them from injury, and that in this case it was the duty of the plaintiff, while working on or about the steamship "Latouche," to use ordinary care to avoid injury to himself while engaged in said work.

XXVIII.

I instruct you that if you find from a preponderance of the evidence that the coal tub in question was old and in disrepair and that the trigger or catch holding the bail thereon in place was defective, and even if you should further find by a preponderance of the evidence that the defendant directed the plaintiff to use said coal tub and furnished said coal tub to [387] plaintiff for use in his work, yet you are further instructed that if you find from a preponderance of the evidence that the plaintiff at the time he used said tub knew its condition and the condition of the trigger and catch and bail thereon, and knew and appreciated the danger thereof, and you further believe that the danger was so imminent that an ordinarily prudent man would not incur it, but would refuse

to use said tub, then the plaintiff cannot recover in this action.

XXIX.

You are instructed that a servant, when he enters the service of an employer, impliedly agrees that he will assume the risks which are ordinarily and naturally incident to the particular service in which he engages, and if you believe from a preponderance of the evidence that the injury to the plaintiff was only the result of one of the risks ordinarily incident to the work in which he was engaged on board the vessel "Latouche," and not otherwise, then McHugh cannot recover in this case, and your verdict should be for the Alaska Steamship Company.

XXX.

You are instructed that it was the duty of the plaintiff McHugh in his work in unloading or assisting to unload coal from the vessel "Latouche," to exercise care to avoid injuries to himself. He was under as great obligation to provide for his own safety from such dangers as were known to him, or were discernible by ordinary care on his part, or were discernible by a proper examination thereof or were discernible by the use of his sight or other senses, as the Alaska Steamship Company was to provide for him. He must take ordinary care to [388] learn the dangers which are likely to beset him in such work. He must not go blindly to his work, where there is danger. He must inform himself.

XXI.

You are instructed that if you find that the coal tub used by McHugh was in a defective condition and that by reason thereof there was risk or danger in using or moving or pulling or shoving it about, and that such risk or danger was patent and obvious to McHugh and such as should have been ascertained by a proper examination thereof, or by the use of his sight and other senses, no notice of such, if any, defective condition of the tub would be required to be given to McHugh by the Alaska Steamship Company.

XXII.

I instruct you that the plaintiff McHugh in going to work upon the steamer "Latouche" assumed the ordinary risks incident to said work and that he continued to carry said assumption during his continuance in said work, even though the defendant the Alaska Steamship Company, was negligent in permitting such, if any, ordinary risks to exist, provided that said McHugh knew of said risks and *and* appreciated them, that is to say, provided that an ordinary man of the age and intelligence of McHugh, by the use of his sight and other natural senses would have known of and appreciated such risks. Actual knowledge of any particular ordinary risk is not required, but only that his experience, age and intelligence were such that he would know such risks existed and appreciate them.

This, gentlemen of the jury, concludes the instructions. You will be handed two forms of verdict—one finding in favor [389] of the plaintiff,

the other finding in favor of the defendant. If you should find a verdict in favor of the plaintiff, you will fill in the blank space in the form handed you, in favor of the plaintiff, by writing therein the amount of damages which you shall find for him, not exceeding in any case, the sum of Ten Thousand Dollars, and have the same signed by your foreman. If you should find for the defendant, your foreman should sign the proper verdict. You will then return the verdict you have unanimously agreed upon into Court as your verdict in this case.

Thereupon in open court and in the presence of the jury, the defendant took the following exceptions, which were allowed:

Mr. ROBERTSON.—We desire to except to the words “And commerce in the seventh instruction. We except to the 8th instruction, to the 9th, 10th, 11th, 14th, 15th, 16th, 17th, 19th, 21st, to the 21½—

The COURT (Interrupting.) That is 20½, I think.

Mr. ROBERTSON.—Yes; 20½ instead of 21½. And we desire also to except to the failure of the Court to give defendant’s requested instructions Nos. 1, 2, 3, 5, 6, 7, 8, 10, 12, 16 and 17. We also except to the failure to give defendant’s supplemental requested instructions Nos. 1, 3, 4, 5 and 6.

And thereupon the jury retired for the consideration of its verdict.

Filed in the District Court, Territory of Alaska, First Division. June 2, 1923. John H. Dunn, Clerk. By ———, Deputy. [390]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

THE ALASKA STEAMSHIP COMPANY, a
Corporation,

Defendant.

Judge's Certificate.

I hereby certify that I am the judge by and before whom the above-entitled cause was tried and that the foregoing bill of exceptions is a full, true and correct account and transcript of the evidence and proceedings had therein, and that it contains the evidence and all the evidence heard or considered at said trial except exhibits of defendant, the originals whereof are ordered forwarded with this transcript.

I also certify that the said bill of exceptions was duly presented and filed within the time allowed by law and the rules of this Court.

Wherefore, said bill of exceptions being true and correct, I do now, within the time allowed by law and the rules of this Court, allow and settle the same, and order it to be filed and to become a part of the records of this cause.

Dated at Ketchikan, Alaska, this 2d day of June, 1923.

THOS. M. REED,
United States District Judge. [391]

In the District Court of the United States for the
District of Alaska, Division Number One, at
Juneau.

No. 566-KA—(2212-A).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Order Re Original Exhibits.

Now on this day, the parties hereto by their respective counsel consenting thereto in open court and it appearing proper to the presiding judge of the above-entitled court that defendant's original exhibits should be inspected by the appellate court upon the writ of error heretofore issued herein;

Now, therefore, it is ordered that defendant's original exhibits herein be transported by the clerk of this court to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco, California, so that said exhibits may be received and considered by said Honorable Court in connection with the tran-

script of the proceedings on the writ of error herein.

Done in open court this 2d day of June, 1923.

THOS. M. REED,

District Judge.

O. K.—WICKERSHAM & KEHOE,

Of Counsel for Plaintiff.

R. E. ROBERTSON,

Of Counsel for Defendant.

Filed in the District Court, Territory of Alaska,
First Division. Jun. 2, 1923. John H. Dunn,
Clerk. By ————, Deputy.

Entered Court Journal No. D, page 440. [392]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 566-KA—(2212-A).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the District Court, Ketchikan,
Alaska:

You will please make up a transcript of the
record in the above-entitled cause, and include
therein the following papers, to wit:

1. Complaint.
2. Amended answer.
3. Order of March 26, 1923, that reply to original answer stand as reply to amended answer.
4. Reply.
5. Verdict.
6. Judgment.
7. Assignment of errors.
8. Petition for writ of error.
9. Bond on writ of error.
10. Writ of error.
11. Citation on writ of error.
12. Bill of exceptions.
13. Order re original exhibits, dated June 2, 1923.
14. This praecipe.

Kindly prepare said transcript in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and forward it to said court in accordance with said rules.

R. E. ROBERTSON,
A. H. ZIEGLER,
Attorneys for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Jun. 2, 1923. Jno. H. Dunn, Clerk. By M. D. Morrissey, Deputy. [393]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 566-KA—(2212-A).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

**Order Extending Time to and Including July 14,
1923, to File Record and Docket Cause.**

Now on this day, for good cause shown, on the motion of R. E. Rebertson, Esq., attorney for the Alaska Steamship Company, a corporation, plaintiff in error and the above-named defendant,

IT IS HEREBY ORDERED that the time within which said plaintiff in error shall file the record and docket this case with the Clerk of the United States Circuit Court of Appeals at San Francisco, California, shall be, and the same is hereby enlarged and extended to and including July 14, 1923.

Done in open court this 25th day of June, 1923.

THOS. M. REED,

District Judge.

Copy received June 25, 1923.

WICKERSHAM & KEHOE,

Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska,
First Division. Jun. 25, 1923. John H. Dunn,
Clerk. By M. B. King, Deputy.

Entered Court Journal No. S, page 191. [394]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

I, John H. Dunn, Clerk of the District Court
for the District of Alaska, Division No. 1, hereby
certify that the foregoing and hereto attached 394
pages of typewritten matter, numbered from One to
394, both inclusive, constitutes a full, true, and
complete copy, and the whole thereof, of the record,
as per praecipe of the plaintiff in error, on file
herein and made a part thereof, in the cause
wherein The Alaska Steamship Company, a Cor-
poration, is plaintiff in error, and Bernard Mc-
Hugh, is defendant in error, No. 566-KA—(2212-
A), as the same appears of record and on file in
my office, and that the said record is by virtue of
a writ of error and citation issued in this cause,
and the return thereof, in accordance therewith.

I do further certify that the transcript was pre-
pared by me in my office, and that the cost of
preparation, examination and certificate, amount-

ing to One Hundred Eighty-seven Dollars and Twenty Cents (\$187.20), has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 25th day of June, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

[Endorsed]: No. 4051. United States Circuit Court of Appeals for the Ninth Circuit. The Alaska Steamship Company, a Corporation, Plaintiff in Error, vs. Bernard McHugh, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1, at Juneau.

Filed July 5, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ALASKA STEAMSHIP COMPANY,
a corporation,

Plaintiff in Error,

vs.

BERNARD McHUGH,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA, DIVI-
SION NUMBER ONE.

BRIEF OF PLAINTIFF IN ERROR

R. E. ROBERTSON,
A. H. ZIEGLER,
BOGLE, MERRITT & BOGLE,
Attorneys for Plaintiff in Error.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ALASKA STEAMSHIP COMPANY, a corporation,	}	<i>Plaintiff in Error,</i>
VS.		
BERNARD McHUGH,	}	<i>Defendant in Error.</i>

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA, DIVI-
SION NUMBER ONE.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This is an action instituted by the plaintiff (defendant in error) against the defendant (plaintiff in error) to recover damages for an alleged personal injury suffered by plaintiff.

Complaint. Plaintiff alleged that defendant was a corporation and a common carrier of freight in

the coastwise carrying trade in Alaskan waters; that on March 8, 1922, at Ketchikan, Alaska, he was employed by defendant as a stevedore to assist in unloading coal from defendant's steamship "La-touche" and was engaged in shovelling coal into a large, heavy iron bucket furnished by the defendant; that the united effort of three men was required to pull said bucket to the place where it could be filled with coal; that the bucket had a large, heavy handle held in place by an iron trigger, and that, on account of long wear and hard usage, the bucket was a dangerous and unsafe appliance for said work; that plaintiff with two other employees was pulling the bucket on the floor of the vessel's hold to the point needed for loading, when said trigger became loosened and caused the handle of the bucket to fall upon plaintiff's foot and across the instep, thereby breaking and crushing the bones, tendons, muscles and flesh of the foot and crippling plaintiff for life; that because of said injuries plaintiff was in the hospital for medical treatment for many weeks and suffered great pain and was obliged to suspend all labor, thereby suffering the loss of all wages from March 8, 1922; that defendant knew that said appliance was unsafe and dangerous but negligently failed and refused to replace and repair it with a safe appliance; that plaintiff had no knowledge or means of ascertaining the condition of said iron bucket and the parts thereof, and that because of his inexperience, being

a common laboring man without knowledge of the mechanism of said bucket and its parts, and because of the darkness in said hold, he was unable to discover the defects in said appliance; that it was defendant's duty to furnish plaintiff with safe and proper appliances or bucket for use in said work; that defendant negligently failed and refused to furnish safe and proper appliances for such work or a well lighted place in which to work; and that by reason of defendant's neglect and carelessness plaintiff suffered damages in the sum of \$10,000; that at the time of the injury plaintiff was a strong vigorous laboring man, thirty-eight years old, capable of, and earning, \$6.50 per day; that said injury wholly destroyed his earning capacity from the date of the injury to the date of the complaint, and permanently reduced his earning capacity by one-half or more for life. (P. R. pp. 1-5).

Amended Answer. Defendant generally denied all of the allegations of plaintiff's complaint, but admitted that it was a corporation and engaged as a common carrier of freight in the coastwise carrying trade in the waters of Alaska, and that on or about March 8, 1922, at Ketchikan, plaintiff was employed by it as a stevedore in unloading coal from defendant's steamer "Latouche." Defendant set up two affirmative defenses:

First: The combined defenses of negligence of fellow servants and of plaintiff's contributory

negligence, namely: that plaintiff was a member of a gang of longshoremen all of whom, including plaintiff, were of full age and experienced in the work aboard said vessel; that the injury was not caused by defendant's negligence but by the negligence of plaintiff and two other members of the longshore crew, with plaintiff's acquiescence and assistance, in moving the tub by pulling it backwards, instead of moving it forward in, and as they, including plaintiff, knew was, the customary and safe way by pulling it on the beackets with which the tub was provided.

Second: The defense of assumption of risk, namely: that defendant was a member of a gang of longshoremen engaged in unloading coal from defendant's vessel, and that plaintiff was of full age and experienced, and knowingly assumed the risks incident thereto; and that plaintiff, after he had become thoroughly acquainted with, and knew the exact condition of said tub, and without making any complaint or objection as to its condition, negligently chose to move said tub by pulling it backwards instead of moving it in, as he knew was, the customary, proper and safe way by pulling it forward by the beackets with which it was provided.

In the affirmative defenses defendant alleged that the steamer "Latouche," at the time in question, was lying in the tidal and navigable waters of the North Pacific Ocean, i. e.: in Tongass Nar-

rows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters and was then and there fully equipped with coal tubs and other appliances in safe, substantial and seaworthy condition necessary for and ordinarily used in said work and on and about steamships similar to said vessel. (P. R. pp. 6-11).

Reply. Plaintiff generally denied the allegation of the two affirmative defenses of the amended answer, but admitted that the steamship "Latouche" was then and there lying in the tidal waters of the North Pacific Ocean and was made fast to the dock and wharf as alleged in the amended answer, and that plaintiff was employed by defendant as a longshoreman. (P. R. pp. 13-15).

Trial was had before a jury which returned a verdict against defendant for the sum of \$4750.00, upon which judgment was entered on April 4, 1923, and from which judgment a writ of error has been prosecuted to this Court. (P. R. pp. 16, 17, 61).

ASSIGNMENTS OF ERROR.

I.

The Court erred in permitting plaintiff's witness Young, on direct examination, over defendant's objections, to answer the question "Was that a safe appliance" (referring to the bucket) "to be used at that time under those circumstances in that

work?" to which said witness answered "I would not consider it so." (P. R. pp. 74, 75).

II.

The Court erred in refusing to permit plaintiff's witness Young, on cross examination, to answer the question propounded by defendant "Do you feel as positive of that" (referring to the position of the men working on the ship) "as anything else you have said in your testimony?" (P. R. p. 126).

III.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to testify as to the length of time the bucket was used after plaintiff was injured, and particularly to answer the question "How long was that bucket used after Barney was hurt?" To which said witness answered "I don't know just how long after." (P. R. p. 137).

VI.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question "Was there any change made in the bucket after Barney was hurt?" To which said witness answered "Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me

on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets." (P. R. p. 138).

VIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the length of time the bucket was used after the accident, and particularly to answer the question "How long did you work with it." To which said witness answered "It wasn't over two hour at the most." (P. R. p. 149).

IX.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the bucket tripping after he went to work, which testimony in questions and answers is as follows:

"Q. Just explain to the jury how that happened and how soon after you went to work.

"Q. How long after you went to work did that happen?

"A. The first time is happened was about half an hour after.

"Q. What happened at that time?

"A. Why it spilled all the coal out of it.

"Q. Where was it when it spilled the coal?

"A. In the center of the hatch.

"Q. How far up?

"A. Oh, it didn't get off the ground at all.

"Q. Well, was the wire cable attached to it when it spilled?

"A. Yes, sir.

"Q. Was anybody touching it?

"A. No, sir.

"Q. What made it trip itself, off, do you know?

"A. Why the catch.

"Q. What was the matter with the catch?

"A. Wore out is all." P. R. pp. 149-150).

X.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to other occasions of the bucket tripping, and particularly to answer the question "Did it do that again any other time that evening?" To which said witness answered, "Yes, sir." (P. R. p. 150).

XI.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the manner that the bucket's handle fell on a subsequent occasion, and particularly to answer the question "Why did the

handle fall that time?" To which said witness answered "Oh, it come unhooked." (P. R. p. 150).

XII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question "You may state to the jury whether or not, in your judgment, it was a safe appliance, safe appliance to be used for that purpose that night." To which said witness answered "It wasn't; no; no." (P. R. p. 151).

XIV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance for handling coal, and particularly to answer the question "Now, from your examination of that bucket that night, and from the actions that you saw it performing, was it or was it not a safe appliance for handling coal," and "Well, then. I will renew my question as to whether or not this bucket that night, as it was being used by Barney and these other people at that time was a safe appliance?" To which said witness answered respectively "It was not" and "No, sir, it was not a safe appliance." (P. R. pp. 162-163).

XV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to testify as to the manner another man was hurt after plaintiff's accident, and particularly to answer the question "How was he hurt?" To which said witness answered "The same way as Barney, only I think the bail took him further up on the leg. They got this man out of the hold and I seen him a couple of days afterwards. He was limping around, and I have seen him since." To which answer, upon defendant's motion, the Court ruled "All that latter part may be stricken." (P. R. pp. 163-164).

XVI.

The Court erred in permitting plaintiff's witness Klemm, on direct examination, over defendant's objections, to testify as to his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question "Mr. Klemm, from your experience as a dumper of these buckets and from your examination of that particular bucket that night, I will ask you as to whether or not it was a safe appliance to be used in that class of work?" To which said witness answered "Well, I wouldn't say so," and "I wouldn't say it was safe because there was no way of holding that, because there was no way of holding that, because, for illustration, I think it was the

first or second bucket that came out of the hold—you hoist the bucket out and give it a kind of swing you know. The winch driver did. You know, he wasn't kind of careful enough; or kind of jerked it a little bit and the bucket was going back and forth enough to throw that little tripper up and it tripped. The bucket dumped itself before it ever got out to me." (P. R. pp. 179-180).

XVIII.

The Court erred in permitting plaintiff, in his own behalf, on direct examination, over defendant's objections, to testify as to his receiving and why he had to receive contributions or charity from other people, and particularly to answer the question "Will you state to the jury then, Mr. McHugh, why you have had to receive contributions or charity from other people?" To which said plaintiff answered "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital I had only \$28.00 of my own and the money I received afterwards of course I had to borrow it; that I must have in order to live." (P. R. pp. 216-219).

XXIV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to an-

swer the question "If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinion, would cause that to exist at this time?" (P. R. p. 345).

XXV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question "Well Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?" (P. R. p. 345).

XXX.

The Court erred in denying defendant's motion for a directed verdict for the defendant herein at the close of the evidence." (P. R. p. 393).

XXXV.

The Court erred in failing and refusing to give defendant's requested instruction No. 5, as follows:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff took hold of the rear rim of the coal tub in question and pulled or shoved thereon, and that when he did so he knew that the bail of said coal tub, if it should fall, could only fall toward the rear and not toward the front of said tub, and that he could have taken hold of said tub by the rim forward of the bail thereon, or by handles attached to the lip of the

tub, or beckets attached to said handles, instead of taking hold of said tub by the rear rim thereof, and that by so doing he could have moved the tub in safety, and that he took hold of the said rear rim of said tub and pulling or shoving thereon was a dangerous way of moving said tub, and that to take hold of the rim or said tub forward of the bail or by handles or beckets attached to said handles on the lip of said tub was a safe way of moving said tub, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work, in such case the jury will find for the defendant." (P. R. pp. 394-395).

XXXVI.

The Court erred in failing and refusing to give defendant's requested instruction No. 6, as follows:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff was directed in moving the coal tub on which he was working to move the same forward with its lip or nose in a forward position, and to so move it forward by pulling on the handles or beckets attached to said handles on the lip of said tub, if you find there were any such handles or beckets, or by taking hold of said tub forward of the bail, and you further find that such was a safe way to move said tub, and that it had been done, the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, moved said tub either by pulling or shoving on the rear rim, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and in such case you should find for the defendant." (P. R. pp. 395-396).

XXXVII.

The Court erred in failing and refusing to give defendant's requested instruction No. 7, as follows:

"I instruct you that if you believe that plaintiff was injured by reason of the bail of the coal tub falling against or upon his foot, and if you find that the condition of said tub including the bail thereof and the trigger or catch, was open and obvious to plaintiff, and considering his age and intelligence, he should and ought to have known the danger, if any, confronting him in the use of said tub and if you find from a preponderance of the evidence that the plaintiff, considering the circumstances surrounding him at the time, was not exercising such care and prudence in undertaking to do the work at which he was engaged that would or should ordinarily be exercised by a person of like age and intelligence of plaintiff under similar circumstances, then plaintiff cannot recover, even though the plaintiff at the time was working pursuant to instructions of the defendant, if you should so find." (P. R. pp. 396-397).

XXXVIII.

The Court erred in failing and refusing to give defendant's requested instruction No. 8, as follows:

"I instruct you that if you find that the plaintiff was injured by reason of the bail of the coal tub in question falling upon or against him, and if you find from a preponderance of the evidence that the condition and manner in which said bail was operated and held in place and released was open and obvious to plaintiff, and if you find from a preponderance of the evidence that plaintiff was of sufficient

intelligence to comprehend and know, and ought to have known, considering his age and intelligence, the danger, if any, surrounding him, then plaintiff cannot recover anything in this case, even if the defendant company was at fault and negligent in allowing said coal tub to be used by the plaintiff or in permitting the trigger or catch on the bail thereof to be out of order, if you find by the preponderance of the evidence that such is the fact and in such case you will render your verdict for the defendant." (P. R. p. 397).

XXXIX.

The Court erred in failing and refusing to give defendant's requested instruction No. 10, as follows:

"I instruct you further that an employee who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promises to remedy the defect; and in the event that the master does so promise, the servant may, by relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and if you believe in this case that the tub with which the plaintiff was working, that the trigger or catch holding the bail in place thereon was defective, and that the defendant company promised to remedy the same but failed to do so

within a reasonable time after such promise, and that McHugh continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such event, I instruct you that McHugh assumed the additional risk of the defect, if any, in said tub, and you will return a verdict for the defendant." (P. R. pp. 398-399).

XL.

The Court erred in failing and refusing to give defendant's requested instruction No. 12, as follows:

"You are instructed that if McHugh engaged with the Alaska Steamship Company in the work of unloading or assisting to unload coal from the steamship Latouche without at the time fully understanding or comprehending the dangers incident to such work, yet if you find that between the time of his employment and the time he was injured he learned of those dangers, if any, or in the course of his employment he ought to have known of the liability to accident by being hit by the bail of the coal tub if the same should fall, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the Alaska Steamship Company." (P. R. p. 399).

XLI.

The Court erred in failing and refusing to give defendant's requested instruction No. 16, as follows:

“You are instructed that the Alaska Steamship Company is not responsible for the negligence of McHugh’s fellow servants, if the jury believes from the evidence that plaintiff’s fellow servants were guilty of negligence, and that such negligence caused the accident by which plaintiff claims to have been injured. The term “fellow servants” as used in these instructions means those who were engaged with the plaintiff in the same work, without any relation to each other, except as co-laborers, and without rank.” (P. R. pp. 399-400).

XLII.

The Court erred in failing and refusing to give defendant’s requested instruction No. 17, as follows:

“You are instructed in this case that if you find from the preponderance of the evidence that the injury which McHugh claims to have suffered was caused by the negligence of his fellow servants, that is, if his fellow servants so negligently handled, moved, pulled or shoved the coal tub with or about which McHugh was working, so as to cause the bail or handle thereof to fall and strike McHugh and to cause said injury, then your verdict should be for the defendant.” (P. R. p. 400).

XLIII.

The Court erred in failing and refusing to give defendant’s supplemental requested instruction No. 1, as follows:

“I instruct you that negligence is defined as being the failure to observe, for the protection of the interest of another person, that

degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

"And in this case you cannot find a verdict for the plaintiff McHugh in any amount whatsoever unless you first find by a preponderance of the evidence that the injury, if any, sustained by him and the damages, if any, incurring to him by reason thereof, were the result of negligence, as hereinbefore defined, of the defendant Alaska Steamship Company or its officers, agents, or employees, or by reason of some defect or insufficiency due to its or their negligence, as hereinbefore defined, in the coal tub or bucket with which said plaintiff McHugh claims to have been working.

"In this behalf I instruct you that the mere occurrence of the injury, or of the damage complained of, if you find by a preponderance of the evidence that the plaintiff McHugh did sustain such injury and damages, is no evidence of negligence on the part of the defendant Alaska Steamship Company or of any of its officers, agents or employees or that the existence of a defect or insufficiency if you so find, in said coal tub or bucket was due to its or their negligence, and I further instruct you that the burden is on the plaintiff McHugh to show, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence, as hereinbefore defined, which proximately caused the injury and damage. The plaintiff McHugh has the burden of proving, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence." (P. R. pp. 400-402).

XLIV.

The Court erred in failing and refusing to

give defendant's supplemental requested instruction No. 3, as follows:

"I instruct you that the mere fact that you find from a preponderance of the evidence that the bail of the coal tub on or about which McHugh claims to have been working fell upon or came in contact with his foot and injured it as claimed by him and that he suffered damages therefrom as contended by him, is no evidence of negligence on the part of the defendant Alaska Steamship Company or any of its officers, agents or employees or that the defect, if you find by a preponderance of the evidence that there was a defect, in said tub or bucket was due to its or their negligence, but the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company was guilty of negligence which proximately caused said, if any, injury, and said, if any, damages, that is to say, the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company or its officers, agents or employees failed to observe, for the protection of said McHugh while he was working on said vessel Latouche on March 9, 1922, that degree of care, precaution and vigilance which the circumstances in connection with said work justly demanded, and that by reason thereof said McHugh suffered said injury and damages." (P. R. pp. 402-403).

XLV.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 4, as follows:

"I instruct you that in this case even though you should find the defendant Alaska

Steamship Company guilty of negligence from a preponderance of the evidence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been permanently injured for the reason that there is no evidence in this case that said McHugh has been permanently injured." (P. R. p. 403).

XLVI.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 5, as follows:

"I instruct you that in this case even though you should find from a preponderance of the evidence the defendant Alaska Steamship Company guilty of negligence and that the plaintiff McHugh is entitled to damages you should not base your verdict upon the theory or conclusion that said McHugh has been permanently incapacitated for the reason that there is no evidence in this case that said McHugh has been permanently incapacitated in his earning power." (P. R. p. 403).

XLVII.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 6, as follows:

"I instruct you that you cannot find the defendant Alaska Steamship Company guilty of negligence in this case unless you find from a preponderance of the evidence that it had knowledge of the defect, if any, in the coal tub or bucket being used by McHugh or that it should have, in the exercise of ordinary

care, acquired such knowledge. I instruct you that it is a rule of law that the master is not usually liable for latent defects, nor is he liable for defects arising so short a time prior to the accident, if any, as not to have been discovered by him in the course of his reasonable inspections. In this case the Alaska Steamship Company is known as the "master," and the plaintiff McHugh is known as the "servant." (P. R. p. 404).

XLIX.

The Court erred in giving its certain instruction numbered 8, which is as follows:

"You are instructed that every common-carrier engaged in trade or commerce in the Territory of Alaska, shall be and is liable to any of its employees for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, appliances and machinery; and you are also instructed that in all actions brought against any common-carrier to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery by the employee where his contributory negligence was slight and that of the employer was gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury." (P. R. 420).

L.

The Court erred in giving its certain instruction numbered 9, which is as follows:

"You are further instructed that in this case the defendant the Alaska Steamship Company, is liable to the plaintiff for all damages which may have resulted to him from the negligence of the defendant or by reason of any defect or insufficiency due to its negligence in its appliance, machinery, ways or works, causing the injury to his person, if any, so alleged to have been received by him on March 8, 1922, while so employed by the defendant in unloading and discharging coal from defendant's steamship, the Latouche, onto the wharf or dock at Ketchikan, Alaska." (P. R. p. 420-421).

LI.

The Court erred in giving its certain instruction numbered 10, which is as follows:

"If you should find from the evidence, however, that the plaintiff was guilty of any contributory negligence in causing the injury complained of, you are hereby instructed that such contributory negligence shall not bar a recovery by him in this case, where his contributory negligence was slight and that of the defendant was gross in comparison. If you should find that the plaintiff was guilty of contributory negligence at the time of the alleged injury, it would then be your duty to determine from the evidence in the case whether his contributory negligence was slight in comparison with that of the defendant, and to diminish the damages, if any, to be allowed to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and of the defendant, and to return a verdict accordingly." (P. R. p. 421).

LII.

The Court erred in giving its certain instruction numbered 11, which is as follows:

"You are instructed that no person shall recover damages from a common-carrier under the laws in force in Alaska for personal injury to himself, where the injury was done by his own consent, or was caused by his own negligence, without any negligence on the part of the defendant; but where the plaintiff and defendant are both at fault, the plaintiff may still recover, provided he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee." (P. R. p. 421).

LIII.

The Court erred in giving its certain instruction numbered 14, which is as follows:

"The jury are instructed that contributory negligence is the negligent act of a plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury. If you shall find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit is brought provides that such contributory negligence is not to defeat a recovery altogether, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution

of damages in proportion to his negligence, as compared with the combined negligence of himself and the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence." (P. R. pp. 422-423).

LIV.

The Court erred in giving its certain instruction numbered 15, which is as follows:

"The statute under which this suit is brought makes the defendant liable to the plaintiff for all injuries suffered by the plaintiff because of its negligence, or that of any of its officers, agents or other employees. Therefore, as a matter of law, the negligence of any officer, agent or employee of the defendant, other than the negligence of the plaintiff himself, is the negligence of the defendant, for which it would be liable." (P. R. p. 423).

LV.

The Court erred in giving its certain instruction numbered 16, which is as follows:

"The plaintiff in this case alleges that the injury he suffered, if any, was caused by the negligence of the defendant in failing to furnish a safe and well-lighted place for him to work in, and safe appliances and equipment with which to work, whereby, he was injured.

"On this branch of the case, the Court instructs you that an employer does not guarantee the absolute safety of the place where the employee works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employee

to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant or employee does not undertake to incur the risks arising from the negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendant and its officers, agents and employees in charge of the work on the steamship Latouche at the time of the injury to plaintiff, resulting from the employment of the plaintiff as a laborer in such work, to exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find by a fair preponderance of the evidence that the plaintiff was so injured on the defendant's steamship Latouche on March 8, 1922, while so unloading and discharging coal therefrom, and that the place where he was required to work was dark and badly lighted, and that the condition of the light prevented the plaintiff from discovering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff." (P. R. pp. 423-425).

LVI.

The Court erred in giving its certain instruction numbered 17, which is as follows:

"The Court further instructs the jury that it was the duty of the defendant steamship company, its officers, agents and employees having charge of the work in which plaintiff

was engaged when he was injured, to furnish to the plaintiff who was in his employ, such tools, appliances, tubs and other instrumentalities as were reasonably safe for the purpose for which they were used; and the Court instructs the jury that if they believe from a fair preponderance of the evidence in this case, that the defendant steamship company or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which it knew to be defective, or which its officers, agents, or employees whose duty it was to superintend the plaintiff's work, knew to be defective, or which, by the exercise of reasonable diligence the defendant or its officers, agents or employees superintending said work might have known to be defective and liable to drop the handle of the said iron bucket when so being used in said work, and that in consequence of said defect the plaintiff, while exercising ordinary care, was injured while in the performance of his duties, then the jury should find a verdict for the plaintiff." (P. R. p. 425).

LVII.

The Court erred in giving its certain instruction numbered 19, which is as follows:

"One of the defenses in this case is that the plaintiff being of full age and experienced in the work of unloading and discharging coal from a steamship unto a wharf or dock at Ketchikan, Alaska, assumed the risks of the employment and cannot recover for that reason.

"On that branch of the case the jury are instructed that the plaintiff assumed only the

risks of injury which were ordinarily incident to the employment in which he was engaged; and you are further instructed, in this connection, that by the use of the expression 'a risk ordinarily incident to the employment' is meant a risk of injury that does not arise or grow out of any act of negligence on the part of the defendant or its servants, and that whenever a risk is created by an act of negligence on the part of a steamship company operating as a common-carrier, or its employees, this is not a risk ordinarily incident to the employment; and if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than his own negligence, if any, this would not be a risk which he assumed as incident to his employment." (P. R. pp. 426-427).

LVIII.

The Court erred in giving its certain instruction numbered 20½, which is as follows:

"There is this difference between the defense of contributory negligence and that of assumption of risk. Contributory negligence is the omission of the employee to use those precautions for his own safety which ordinary prudence requires; while assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects.

"The jury, in the case of defense of contributory negligence, should compare the negligence of the parties, if any shown, and such defense is not a bar to plaintiff's recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages should be diminished by the jury in proportion to the amount of the employee's negligence.

"If the jury, on the other hand, find that the plaintiff assumed the risk of his employment under the instruction I have given you, then such finding would be a bar to plaintiff's recovery and your verdict should be for the defendant." (P. R. pp. 428-429).

LIX.

The Court erred in giving its certain instruction numbered 21, which is as follows:

"The jury is instructed that if you shall find a verdict for the plaintiff in this case, it will be your duty to assess the damages which he has sustained, not to exceed the sum of Ten Thousand Dollars demanded in his complaint. The damages, if any, in this case, cannot be exemplary; that is, given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint, also the condition of his health and physical ability to labor, before the accident complained of, as compared with the present condition thereof and how far the injury is probably permanent in its character and results, as well as the mental and physical

suffering he has suffered, if any, by reason of the injury; and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate results of the accident, not to exceed the amount demanded in the complaint." (P. R. p. 429).

LX.

The Court erred in receiving and filing herein the verdict of the jury in favor of the plaintiff and against the defendant. (P. R. p. 16).

LXI.

The Court erred in entering judgment herein in favor of the plaintiff and against the defendant, which said judgment was entered herein on April 4, 1923, in favor of the plaintiff and against the defendant, for the sum of \$4,750.00. (P. R. p. 17).

POINTS.

We regret that duty compels us to present so large a number of assignments, but in our view of the law and the facts the errors committed at the trial were not only numerous but also so prejudicial to defendant as to permit no recourse other than to present them in their entirety to this Court. Their discussion, logically as we believe, falls within the scope of a comparatively few legal principles, viz.:

1. Opinion evidence, that the appliance with which plaintiff worked was dangerous, was irrelevant and inadmissible.

2. Evidence of plaintiff's pecuniary condition and financial embarrassment was irrelevant and inadmissible.

3. Evidence of an accident occurring after plaintiff's injury was irrelevant and inadmissible.

4. Evidence of changes, repairs and precautions subsequent to plaintiff's injury was irrelevant and inadmissible.

5. The defendant was entitled to cross-examine plaintiff's witness as to the positiveness of his testimony.

6. The defendant was entitled to offer evidence in rebuttal of plaintiff's evidence.

7. Instructions must be based upon evidence and not upon abstract propositions of law.

8. The Act of June 11, 1906, ch. 3073, 34 Stat. L. 232, known as the First Employer's Liability Act, was inapplicable to this case.

9. The common law doctrine of assumption of risk applies to cases arising under the First Employer's Liability Act.

10. Contributory negligence is a bar to a recovery under the First Employer's Liability Act, except where the employee's negligence is slight

and the employer's negligence is gross in comparison thereto.

11. Under the First Employer's Liability Act there is no liability without negligence.

12. The Court should have directed a verdict for the defendant.

ARGUMENT.

I.

OPINION EVIDENCE, THAT THE APPLIANCE WITH WHICH PLAINTIFF WORKED WAS DANGEROUS, WAS IRRELEVANT AND INADMISSIBLE.

(A) Special knowledge was unnecessary to know whether the coal tub was a dangerous or a safe appliance.

Plaintiff's witness Young stated that it was perfectly apparent to him why the bucket dumped on the first occasion (P. R. p. 72). Plaintiff's witness Soderberg testified that a look told him of the defect (P. R. pp. 160, 161, 167). Plaintiff's witness Klemm testified that he could have ascertained the defect without any light at all, that he could feel it (P. R. p. 187), indicating that the defect was so apparent and the mechanism so simple that he did not even have to see it to have knowledge of it.

Plaintiff claimed that he was a ~~master~~ plumber by trade; had held nearly every position in a mine; had put in an air ventilation system in a compressor room; had done axe work in connection with the bulding of bridges and culverts; had done station work on the railroad with pick and shovel and wheelbarrow; had worked on freight cars unloading sacks of ore with a hook into a sling or wire netting; had worked in a logging camp, had bucked and split wood and fired a donkey engine; had been a carpenter's helper; had shovelled rock; had actually done plumbing; had done pipe fitting in a mine; was in business for himself as a plumber in Seattle and Vancouver; and that he had seen coal buckets before, but he had never worked with one (P. R. pp. 189-204).

Plaintiff's own testimony discloses not only an intelligence amply sufficient to comprehend and appreciate the coal bucket, its character, use and operation, and the dangers and risks incident thereto, but a special knowledge based upon wide experience of the use of various tools, ranging from the use of shovel and pick to the use of tools of the carpenter helper and the master plumber. If special knowledge was necessary to know the nature of a coal tub, then can plaintiff conscientiously deny that his experience—he had done even the skilled work of plumbing and pipe fitting—was not more than sufficient to give him that special knowledge. Strangely enough, his ignorance permitted him to

notice the wheels of the coal tub (P. R. p. 274). He saw them easily enough. Why, then, could he not just as easily see the bail and trigger of the coal tub? They were apparently just as easily to be seen, as the witness Soderberg stated that there was nothing about the tub that could not be easily seen, and that there was no concealed mechanism. (P. R. p. 173).

Under these circumstances did not the Court err in permitting, over defendant's objection, the witness Young (Assignment No. 1, p. 5 herein; P. R. pp. 74-75), the witness Gillis (Assignment No. 12, p. 9 herein; P. R. p. 151), the witness Soderberg (Assignment No. 14, p. 9 herein; P. R. p. 162-163), and the witness Klemm (Assignment No. 16, p. 10 herein; P. R. pp. 179-180), to give their opinion to the jury as to whether or not the coal bucket was a dangerous or a safe appliance.

(B) The facts alone should have been described to the jury and the conclusion left for them to draw.

The Court in permitting this evidence clearly erred as the witnesses should have been confined to facts and not allowed to venture into conclusions. As to the principle of law applicable, we see no difference between the facts of this case and the facts in *Spokane and I. E. R. Co. v. U. S.*, 210 Fed. 243, L. R. A. 1917A, 558, 563, affirmed 241 U. S.

344, 60 L. ed. 1037, wherein this Court held that a question of similar import was not properly the subject of expert testimony.

No technical learning was required to disclose the condition of the object under consideration; the tub was a common thing of ordinary construction, and the simplicity of common sense would have been a safer guide to its comparative safety or dangerousness than the niceties of technical or expert knowledge. The jury was, therefore, the best judge as to whether it was a dangerous or a safe appliance. To this effect see:

Harrington v. R. Co., 118 N. E. 880, 2 A. L. R. 1063;

Weller v. Camp, 28 L. R. A. (N. S.) 1106, 52 So. 929;

Siegel C. & Co., v. Treka, 2 L. R. A. (N. S.) 647, 75 N. E. 1053;

McKim v. Philadelphia, 19 L. R. A. (N. S.) 506, 66 Atl. 340;

Detzur v. Brewing Co., 44 L. R. A. 500 (Mich.);

Coe v. Van Why, 80 P. (Colo.) 894.

II.

EVIDENCE OF PLAINTIFF'S PECUNIARY CONDITION OR FINANCIAL EMBARRASSMENT WAS IRRELEVANT AND INADMISSIBLE.

Over the objection of defendant, the plaintiff himself was permitted to answer the question: "Will you state to the jury, then, Mr. McHugh, why you have had to receive contributions or charity from other people, since the 8th or 9th day of March, 1922?" (Assignment No. 18, p. 11 herein; P. R. pp. 216-219), or, in other words, the plaintiff was permitted to testify that ever since the accident he had been poverty stricken and dependent for his livelihood upon the charity of others. If the real object of the question was to ascertain whether or not the plaintiff had been able to do any work since the accident, a form of question peculiarly adapted to arousing the prejudices of the jury was adopted for eliciting that information. The question, moreover, was put after repeated objections by defendant to that line of evidence (P. R. pp. 217-218). To the question, plaintiff answered: "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital, I had only \$28.00 of my own and the money I received afterwards, of course, I had to borrow it; that I must have in order to live." (P. R. p. 219).

The evidence is clearly within the scope of the language of the United States Supreme Court, viz.:

"This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evi-

dence, was entitled to compensation and nothing more, for such damages as he had sustained in consequence of injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty."

Pennsylvania Co. v. Roy, 102 U. S. 451,
26 L. ed. 141, 145.

While the decision of the Federal Supreme Court pointedly indicates the error thus committed, there are many other cases of eminent authority to the same effect. Among them, are:

Biscuit Co. v. Nolan, 138 Fed. 6 (8th C. C. A.);

Union Pac. R. Co. v. McMican, 194 Fed. 393;

LaCorazza v. Cantalupo, ²¹⁰~~214~~ Fed. 875,
(2nd C. C. A.);

Cauble v. R. R. Co., 216 Fed. 712;

Steinberger v. Cal. Elec. Gar. Co., 168 P. 570.

III.

EVIDENCE OF ACCIDENT HAPPENING
AFTER PLAINTIFF'S INJURY WAS IRRELE-
VANT AND INADMISSIBLE.

Over the objection of defendant, plaintiff's witness Soderberg was permitted to testify as to another accident occurring subsequently to defendant's injury. The objectionable question: "How

was he hurt?" followed the answer of the witness: "There was another man hurt about half an hour later on, probably an hour and a half." Not until that answer had been uttered, could it be foreseen that the testimony embraced a period of time subsequent to plaintiff's accident. Defendant's counsel promptly objected to the question, but was overruled, and the witness answered: "The same as Barney, only I think the bail took hm further upon the leg. They got this man out of the hold and I seen him a couple of days later. He was limping around and I have seen him since." The latter part of the answer was then stricken on defendant's motion (Assignment No. 15, p. 10 herein; P. R. p. 164).

We submit that this evidence could in no wise establish defendant's negligence, and that its only result and purpose were to prejudice the jury, to distract their attention from the real issues, and not to disclose any actual responsibility for the injury to plaintiff. The testimony is well within the objectionable features outlined by the Federal Supreme Court in *Columbia R. R. Co. v. Hawthorne*, 144 U. S. 202, 207.

Similar evidence was properly stricken in the opinion of the Michigan Supreme Court, which said:

"In *Lomar v. Village of East Tawas*, 86 Mich. 14, 48 N. W. 947, it was permitted to be shown that others had stepped into the same

hole prior to plaintiff's injury, for the purpose of showing the existence of the defect at the time the injury occurred; and it was said that such evidence was competent, as it might also tend to show constructive notice of the defect to the village. It was further said in that case that there was some conflict of authority even upon this right. We have been unable to find any case going beyond this ruling, and holding that a plaintiff upon such a trial might introduce proof that others fell or stepped into the hole *after the injury* occurred, even with a showing that it was in the same condition as when plaintiff was injured."

McGrail v. Kalamazoo, 53 N. W. (Mich.) 955, 956.

"Evidence of accidents happening after the injury to plaintiff is not admissible."

29 CYC. 613.

"It is not permissible, however, to prove that others stumbled in the same place after the accident."

Branch v. Klatt, 138 N. W. (Mich.) 263, 264.

IV.

EVIDENCE OF CHANGES, REPAIRS, AND PRECAUTIONS SUBSEQUENT TO PLAINTIFF'S INJURY WAS IRRELEVANT AND INADMISSIBLE.

This general principle is stated by CYC in the following language:

"While some courts hold to the contrary, the great weight of authority is that evidence

of changes or repairs made subsequently to the injury, or as to precautions taken subsequently to prevent recurrence of injury, is not admissible as showing evidence or as amounting to an admission of evidence."

29 CYC 616.

The leading case on this subject is from the United States Supreme Court. The writ of error before that court directly presented for decision the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction. The Court said:

"Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the higher courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.
* * * *

"The only states, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. * * * * ."

Columbia R. R. Co. v. Hawthorne, 144
U. S. 202, 207.

hole prior to plaintiff's injury, for the purpose of showing the existence of the defect at the time the injury occurred; and it was said that such evidence was competent, as it might also tend to show constructive notice of the defect to the village. It was further said in that case that there was some conflict of authority even upon this right. We have been unable to find any case going beyond this ruling, and holding that a plaintiff upon such a trial might introduce proof that others fell or stepped into the hole *after the injury* occurred, even with a showing that it was in the same condition as when plaintiff was injured."

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* * * *

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Columbia R. R. Co. v. Hawthorne, 144
U. S. 202, 207.

The spirit of this rule was violated no less than *four* times by the erroneous admission of evidence at the trial hereof.

Over defendant's objection, plaintiff's witness Williams was permitted to answer the question: "Was there any change made in the bucket after Barney was hurt?" (Assignment No. VI, p. 6 herein; P. R. p. 138). The witness answered: "Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets." Here the defendant's precautionary measure of laying the bucket aside was converted into a prejudicial circumstance of prior negligence.

Over defendant's objection, plaintiff's witness Gillis was permitted to answer the question: "Why did the handle fall that time?"—referring to an occasion subsequent to plaintiff's accident (Assignment No. XI, p. 8 herein; P. R. p. 150). Witness answered: "Oh, it come unhooked." Here, the fact that on a later occasion the handle fell and became unhooked is made proof of defendant's negligence at the time that the handle had struck plaintiff.

Over defendant's objection, plaintiff's witness Williams was permitted to answer the question: "How long was that bucket used after Barney was

hurt?" (Assignment No. III, p. 6 herein; P. R. p. 137). The answer: "I don't know just how long after," is indefinite as to time, but in its indefiniteness clearly carries the prejudicial impression that some defect existed in the bucket because of defendant's negligence and that defendant subsequently admitted that prior negligence by laying the bucket to one side.

Over defendant's objection, plaintiff's witness Gillis was permitted to answer the question: "How long did you work with it?"—referring to the time the bucket was used after the accident. (Assignment No. VIII, p. 7 herein; P. R. p. 149). The witness' answer: "It wasn't over two hours at the most," again carried the prejudicial impression that the cessation of use of the bucket necessarily proved defendant's negligence.

We urge that by this evidence defendant's adoption of the safeguard of discarding the use of the bucket after the accident was erroneously converted into an admission of prior negligence, contrary to the true rule expressed in *Morse v. M. & St. L. Ry.*, 30 Minn. 465, and approved by the Federal Supreme Court in *Columbia R. R. Co. v. Hawthorne*, *supra*.

All of the testimony elicited over defendant's objections from the plaintiff's witness Gillis (Assignments Nos. IX and X, pp. 7, 8 herein; P. R. pp. 149-150) is subject to this same fundamental error.

Reference is made to this evidence as it appears in the record, it being too lengthy to otherwise than comment upon here generally, but it is respectfully urged that the record clearly shows that all of this particular testimony was received over defendant's objections, and that it clearly relates to matters subsequent to plaintiff's accident.

V.

THE DEFENDANT WAS ENTITLED TO CROSS EXAMINE PLAINTIFF'S WITNESS AS TO THE POSITIVENESS OF HIS TESTIMONY.

Section 1498, C. L. A., 1913, provides:

"The adverse party may cross examine the witness as to any matter stated in his direct examination or connected therewith, and in doing so may put leading questions; but if he examine him as to any other matters, such examination shall be subject to the same rules as a direct examination."

The Court refused to permit plaintiff's witness Young to answer on cross examination the question: "Do you feel as positive of that" (referring to the position of the men working on the ship) "as anything else you have said in your testimony?" (Assignment No. II, p. 6 herein; P. R. p. 126). The witness Young had theretofore testified as to the position of the men working on the ship (P. R. p. 126), and had been called to the stand, as shown by his evidence, by the plaintiff

for the purpose of setting the entire stage of facts upon which plaintiff's case rested.

Clearly there was nothing incompetent in the question, and defendant was entitled to know the degree of certainty that the witness had as to the matters concerning which he testified. The Court, however, denied defendant that right.

The general principle of law on this subject is:

"A witness may be interrogated as to his certainty concerning the matters about which he has testified or be asked whether he is positive about a matter which he has not stated positively in his direct examination."

40 CYC. 2490.

In a case arising in Michigan, the witness was asked the question: "Is there any doubt existing in your mind that the man who was standing at the right side of Rutan at the time you looked through was this defendant Wallin?" An objection to the question as being incompetent was overruled. On this subject, the Michigan Supreme Court, speaking through its Chief Justice, the eminent jurist Cooley, said:

"It sought to bring out, it is said, not what the witness saw at the time and the impression then made, but the conclusion to which he had subsequently arrived. This conclusion might depend much upon the character of the witness. With one person the impression might strengthen until it became a certainty in the mind; with another, reflection might remove it. But, while this may be true,

we think the question unobjectionable. The witness had testified that he thought the man he saw was Wallin. If he, when testifying, had any doubts of the identity, it was proper to ascertain the fact; if he had none, the grounds of his belief might be inquired into. The jury were entitled to know what the witness knew respecting the identity, and how positive his knowledge was. If he was speaking doubtfully they should know it, and if with confidence it was proper they should know the grounds of his confidence."

People v. Wallin, 22 N. W. (Mich.) 15 at 17.

VI.

THE DEFENDANT WAS ENTITLED TO OFFER EVIDENCE IN REBUTTAL OF PLAINTIFF'S EVIDENCE.

The Court refused to permit defendant's witness Story to answer the question: "If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinion, would cause that to exist at this time?" (Assignment No. 24, p. 11 herein; P. R. p. 345), and the question: "Well, Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?" (Assignment No. 25, p. 12 herein; P. R. p. 345). Dr. Story was the physician who first treated the plaintiff P. R. p. 224), and he stated that

plaintiff's injury was healed when plaintiff was discharged from the hospital (P. R. p. 337, 338), and that he found no injury on the first metatarsal bone at the time of his treatment of plaintiff (P. R. p. 344).

Plaintiff's medical witness Mustard had testified on plaintiff's case in chief that plaintiff complained of some inflammation in the first metatarsal bone, but that he did not see the foot until after the injury (P. R. pp. 233, 234). Even so, Dr. Mustard expressed his opinion that the condition was apparently due to the injury (P. R. p. 236). Such being the status of the record, it was unjust and erroneous to deny the defendant the right to ascertain from its witness—the original medical attendant upon the plaintiff—his opinion as to the cause of the condition in the first metatarsal bone. If plaintiff was entitled to the benefit of the opinion of his medical witness as to the cause of the condition of that bone, then, we submit, that the defendant was entitled to the opinion of its medical witness as to the cause of that condition.

38 CYC. 1343.

VII.

INSTRUCTIONS MUST BE BASED UPON EVIDENCE, AND NOT UPON ABSTRACT PROPOSITIONS OF LAW.

The statutory law governing the giving of the instructions in this case, so far as pertinent, is:

"When the jury has been completed and sworn, the trial shall proceed in the order prescribed in this section, unless the court for special reasons otherwise direct:

"* * * * *" (Note: paragraphs 1 to 5 omitted).

"Sixth. The court shall then charge the jury, and if either party requires it, and shall at the commencement of the trial give notice of his intention so to do, the charge of the court, so far as it relates to the law and the facts of the case, shall be reduced to writing and given to the jury by the court as written, without any oral explanation. The charge, when reduced to writing, must be filed with the clerk."

Sec. 1019, C. L. A. 1913.

"In charging the jury the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact."

Sec. 1023, *ibid*.

There is neither under these nor any other statutes, so far as we are informed, any authority for the trial court to give to the jury instructions, however correct as abstract propositions of law, which are not based on evidence. Such is, we submit, the general principle of law, and such has been the ruling of the Supreme Court of Oregon, from which state these statutes came.

"We have held it to be error for the trial court to give to the jury instructions, however

correct as abstract propositions of law, if not based on evidence.”

Woodward v. O. Ry. & N. Co., 22 P. (Ore.) 1076, 1080.

To the same effect, see:

Roberts v. Parrish, 22 P. (Ore.) 136, 138;

State v. Hogg, 129 P. (Ore.) 115, 116.

This Honorable Court has had occasion to reaffirm this doctrine.

“The difficulty in the way of giving this instruction was that there was no testimony which warranted it. There is nothing in the evidence to show that Wert was serving upon American vessels prior to March, 1901.”

Holmgren v. U. S. 156 Fed. 439, 445.

Over defendant's objection the Court charged upon the hypothesis that there was evidence to go to the jury as to the place of work being dark and badly lighted (Assignment No. 55, p. 24 herein; P. R. pp. 423-425). An examination of the record will not disclose, we believe, any evidence upon which to base the instruction. Plaintiff's witness Klemm testified that there was plenty of light in the hold (P. R. p. 182). Plaintiff's witness Young testified that the lights in the hold were sufficient to cause a glare and that he presumed that the place of work of the longshoremen was illuminated (P. R. pp. 76, 132). Defendant's witness Pollow testified that the lights were sufficient to make it very bright where the men were work-

ing (P. R. p. 302). Plaintiff himself testified that it was pretty easy to see from a distance the rollers or wheels underneath the tub (P. R. p. 274, 275), plainly indicating that there was ample light in which to see them.

The Court also charged the jury to consider how far the injury was probably permanent in its character and result (Assignment No. 59, p. 28 herein; P. R. p. 429); thus placing before the jury the issue raised by plaintiff's complaint that he was injured in a permanent way (P. R. p. 4), and that his earning capacity had been permanently reduced by one-half or more for life (P. R. p. 5). Our contention, that there was no evidence in support of this issue, is corroborated, we believe, by the words of the learned trial court itself in the course of the trial (P. R. p. 280).

There being no evidence, these charges necessarily were erroneous as they placed before the jury issues which unavoidably prejudiced defendant in three essentials: (a) the condition of the place of work, (b) the permanency of the injury, and (c) the permanency of incapability of earning power. We submit this was error: cases cited, *supra*; 38 CYC 1612, 1671.

There being no evidence to support these issues raised by the pleadings, defendant requested instructions that would eliminate those issues, viz.: that there was no evidence that the plaintiff had

been permanently injured (Assignment No. 45 p. 19 herein; P. R. p. 403), and that there was no evidence that the plaintiff had been permanently incapacitated in his earning power (Assignment No. 46 p. 20 herein; P. R. p. 403-4). This request was denied, and in refusing the instructions error was committed. 38 CYC 1621.

As to the principle involved in the erroneous giving and refusal of these several instructions, see also: *Hall v. McKinnon*, 193 Fed. 572; *Cavoretto v. Alaska Gastineau M. Co.*, 245 Fed. 853, *Port Wells Mill & Lumber Co. v. Crawford*, 264 Fed. 935.

VIII.

THE ACT OF JUNE 11, 1906, CH. 3073, 34 STAT. L., KNOWN AS THE FIRST EMPLOYER'S LIABILITY ACT, WAS INAPPLICABLE TO THIS CASE.

(A) *The Act of June 11, 1906, was repealed by the Act of April 22, 1908.*

In 1907 the Act of June 11, 1906, was declared unconstitutional by the United States Supreme Court in attempting to include in its operation all employees of interstate carriers as well as those engaged in intrastate as those engaged in interstate traffic. *Employer's Liability Cases*, 207 U. S. 463, 53 L. ed. 297. Soon after the rendition of the adverse decision the President addressed Congress in respect thereto as follows:

"As regards the employer's liability law, I advocate its immediate re-enactment limiting its scope so that it will apply only to the class of cases as to which the Court says it can constitutionally apply, but strengthening its provisions within its scope."

Cong. Rec. 60th Cong. 1st Section, 1347.

Congress promptly enacted the Second Federal Employer's Liability Act of April 22, 1908, and eliminated therefrom the objectionable features that rendered it unconstitutional, making it applicable to the class of cases to which it could constitutionally apply.

A comparison of the verbiage of the two acts clearly demonstrates Congress' intention by the Second Act to repeal the First Act. Section 1 of the First Act provides:

"That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars,

engines, appliances, machinery, track, road-bed, ways, or works.”

Sec. 1, Act of June 11, 1906, ch. 3073, 34 Stat. L. 232.

Plainly thereby Congress dealt, first, with trade or commerce in the District of Columbia and the Territories, and, second, with interstate commerce, commerce with foreign nations and between the territories and the states. *El Paso &c. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106.

In the Second Act Congress used two separate sections in which to cover these two classes of localities—apparently with a view of preventing the Act being declared void as a whole by reason of the possible invalidity of the provisions relative to one or the other of the classes of localities. These two sections provide:

“That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury

or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

"That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Sections I and II, Act of April 22, 1908,
ch. 149, 35 Stat. L. 65.

Section 2 of the First Act is practically identical with Section 3 of the later Act, except that in the First Act Congress recognizes comparative degrees of negligence and restricts contributory negligence to not being a bar to recovery only where the employee's negligence was slight and that of the employer was gross in comparison; whereas in the

second act contributory negligence, regardless of degree, acts not in bar but only in proratable diminution of damages.

Section 4 of the Second Act restricting in certain cases the common law doctrine of assumption of risk has no equivalent in the First Act.

Section 5 of the Second Act, while not in the same language, is undoubtedly of the same legal purport as Section 3 of the First Act. Section 6 of the Second Act, as originally enacted, provides a limitation of two years whereas Section I of the First Act provides a limitation of one year. Section 7 of the Second Act provides that the term "common carrier" shall include the receiver or other person conducting the business.

Section 5 of the First Act provides:

"That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety appliance Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903."

Section 8 of the Second Act provides:

"That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to effect the prosecution of any pending proceeding or right of action under the Act of Congress" of June 11, 1906—the first employers liability Act.

The elimination of the words "by railroads" in Section 8, *supra*, of the subsequent act must

have had some purpose. Inasmuch as the second Act was being limited to railroad common carriers (*Southern P. Co. v. Jensen*, 244 U. S. 205, 212, 61 L. ed. 1086, 1097), whereas the first Act had extended to all common carriers (Employer's Liability Cases, *supra*), Congress, by the elimination of those words in the second act, laid emphasis upon the repeal of the all common carrier act by the railroad common carrier act; otherwise, the statute limited to railroad common carriers would not have expressly pointed out that such act should not limit the duty or liability of other common carriers. But that there might be no question of this repeal, Congress specifically limited the act in its effect upon any proceeding or right of action under the Act of June 11, 1906, to such as were *pending* under that act. Could language be more clear that Congress thereby announced that the first clause of Section 8, *supra*, should not be construed to mean that the Act of April 22, 1908, did not repeal the Act of June 11, 1906.

So far as we are informed, the United States Supreme Court has never had occasion to directly pass upon the question as to whether or not the Act of June 11, 1906, was so repealed by the Act of April 22, 1908. In *Philadelphia B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 915, Mr. Justice Hughes described the First Employer's Liability Act in a mode of speech customarily indi-

cative of something that has gone before or past, to-wit:

“The *former* Act of June 11, 1906, which was valid as to employees engaged in commerce within the District of Columbia * * * * *contained* explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that Act *was* as follows: * * * * .

“But it is urged that the *substituted provision*—of Section 5 of the Act of 1908—failed to embrace that which the *earlier* act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section, and to *make it* more comprehensive by a generic, rather than a specific, description.”

This language impresses us that the United States Supreme Court considers that the first employer's liability act was repealed by the Second Act.

The Act of April 22, 1908, expressly applies to Porto Rico. *R. R. Co. v. Birch*, 224 U. S. 547, 555, 56 L. ed. 879, 882; *R. R. v. Didricksen*, 227 U. S. 145, 148, 57 L. ed. 456, 457; hence, if the Act of June 11, 1906, was not repealed by the Act of April 22, 1908, in the Territory of Alaska common carriers by railroad are subject to the provisions of both acts.

Practically alike in most features, those two acts are essentially distinct so far as the application of the defense of contributory negligence: under the second Act contributory negligence, regardless of

degree, is not a bar to recovery; under the former Act an employee's contributory negligence of a degree equal to or greater than the employer's is a bar to a recovery, and the first Act contains no limitation of the common law doctrine of assumption of risk. Hence, an employee of a common carrier by railroad in Alaska, suing his employer for damages, will find himself in the quandary of not knowing under which Act he should proceed; the employer, in ignorance of under which act he could defend.

These inconsistencies in the two Acts clearly constitute the repeal by implication of the Act of June 11, 1906, by the Act of April 22, 1908. Lewis' Sutherland Stat. Const. (2d. ed.) Sec. 247.

(B) The Act of June 11, 1906, does not affect the uniform maritime rule.

Construing the Act of April 22, 1908, the Federal Supreme Court has held that:

"It is unreasonable to suppose that Congress intended to change long established rules applicable to maritime matters merely because the ocean going ship concerned happened to be owned and operated by a company also a common carrier by railroad."

Southern P. Co. v. Jensen, 244 U. S. 205,
213, 61 L. ed. 1086, 1097.

But, it may be contended, that defendant is a common carrier engaged in the coasting trade. Nevertheless, if the Act of June 11, 1906, is extant,

it is to be regarded as a local law and not as a law of the United States within the meaning of the Judicial code, and the Act, so far as constitutional, was the result of the exercise of the purely local power of Congress. *Wash., A. & Mt. V. R. R. Co. v. Downey*, 236 U. S. 190, 59 L. ed. 533.

Plaintiff was engaged in longshore work aboard a vessel located in navigable waters and his work consisted of unloading coal from the vessel (Amended Answer and Reply, P. R. pp. 6-15). He is, thus brought within the language of the Supreme Court of the United States, viz.:

“The work of a stevedore in which the deceased was engaged is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atl. Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208.”

Southern P. Co. v. Jensen, supra.

Does a different rule of maritime law apply in Alaska than in the states? Mr. Justice Bradley, speaking for the United States Supreme Court relative to our maritime law, said:

“One thing, however, is unquestionable; the constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the

disposal and regulation of the several states as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

The Lottawanna, 21 Wall. 58; 22 L. ed. 654, 662.

This customary uniformity of operation of maritime law renders it unlikely that Congress, in the exercise of its purely local power of Government over the territories and the District of Columbia intended, even if empowered to do so, to establish in maritime matters a new rule that not only differed from the long established maritime rules but which applied nowhere except in the territories and the District of Columbia. Herein is found an additional circumstance of Congress' intention by the Act of April 22, 1908, to repeal the Act of June 11, 1906. The former Act had been declared unconstitutional in respect to interstate commerce (*Employer's Liability Cases*, *supra*); the latter act applies to the territories (*R. R. Co. v. Birch*, *supra*; *R. R. Co. v. Didrickson*, *supra*). Shall we presume that Congress left unrepealed an Act whose application to maritime rules was local and not uniform?

In passing, it will be noted that of course the Act of April 22, 1908, does not apply hereto, because it is limited to common carriers by railroad. *Southern P. Co. vs. Jensen*, *supra*.

Neither does the territorial act of April 30, 1913, Chap. 45, A. S. L. 1913, entitled "An Act to fix the liability of employers for personal injuries sustained by their employees." Defendant is clearly excluded from that Act by Section 1 thereof, towit:

"That every person, association, or corporation engaged in the business of manufacturing, mining, constructing, building, or other business or occupation carried on by means of machinery or mechanical appliances, shall be liable, &c."

Sec. 1, Ch. 45, A. S. L., 1913.

In any event the Territory with its limited authority has no power to do that which a state cannot do, i.e.: destroy the uniformity of laws concerning maritime matters. *Southern P. Co. v. Jensen*, *supra*.

In either view of the case, that the Act of June 11, 1906, was repealed by the Act of April 22, 1908, or that the Act of June 11, 1906, does not establish a special and local maritime rule applicable only in the territories and the District of Columbia, the learned trial Court erred in refusing the defendant's instructions relative to the negligence of fellow servants constituting a bar (Assignments Nos. 41 and 42, pp. 16, 17 herein; P. R. pp. 399-400), and in giving, over defendant's exception, its instructions relative to the abrogation of the defense of fellow servants (Assignments No's. 54, 55, 56

and 57, pp. 24-26 herein; P. R. pp. 423-426), and its general instruction (Assignment No. 50 p. 21; P. R. p. 420).

IX.

THE COMMON LAW DOCTRINE OF ASSUMPTION OF RISK APPLIES TO CASES ARISING UNDER THE FIRST EMPLOYER'S LIABILITY ACT.

Defendant contends that, admitting for the purposes of argument that the circumstances of this case are governed by the Act of June 11, 1906, Ch. 3073, 34 Stat. L. 232, the learned trial court committed certain fundamental errors in its application of the provisions of that act to the case.

One of the distinctions between that Act and the Second Employer's Liability Act of April 22, 1908, Ch. 149, 35 Stat. L. 65, is that the First Employer's Liability Act is devoid of any restriction upon the common law doctrine of assumption of risk. The Act of April 22, 1908, however, contains a limitation upon the doctrine but that limitation is confined to cases where the violation by the employer of any statute enacted for the safety of employees contributed to the injury or death of such employee. *Jacobs v. So. R. Co.*, 241 U. S. 229, 60 L. ed. 970; *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062.

Inasmuch as the Act of June 11, 1906, contains no language importing a similar or any limitation upon that doctrine, we submit that that doctrine applies to cases under that Act with as unmodified vigor as at common law. *Butler v. Frazee*, 211 U. S. 459, 53 L. ed. 281, 285; *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. ed. 1030.

(A) Plaintiff assumed the risk, of which he had knowledge or which he appreciated, attendant not only upon the appliances with which he worked but of the place in which he worked, even though arising out of defendant's negligence.

The Court charged that "the negligence of any officer, agent, or employee of defendant, other than the negligence of plaintiff himself, is the negligence of the defendant, for which it would be liable" (Assignment No. 54, p. 24 herein; P. R. p. 423). This instruction is doubtly erroneous. It takes no cognizance of the fact that the plaintiff's contributory negligence, if equal to or of a greater degree than defendant's negligence, constituted a bar to the recovery of damages or of the fact that plaintiff assumed the risks of which he had knowledge or which he appreciated, even though they arose out of the employer's negligence.

The charge left with the jury the impression that absolute liability devolved upon the defendant for the negligence of any of its officers, agents or employees. Such doctrine does not accord with the

United States Supreme Court's decisions under the Second Employer's Liability Act, which decisions, we submit, are the best authority herein. Mr. Justice Pitney, speaking for that Court, said:

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

Seaboard A. L. R. Co. v. Horton, supra.

Where is the evidence in the record of any objection made by plaintiff to any appliance with which he was working or to the condition of the place in which he was working, or of any promises made by the defendant to correct any alleged defect? Can we believe that plaintiff, who is an experienced plumber by trade (P. R. pp. 203, 252), did not know and appreciate the fact that if the iron bail of the coal tub fell on him he would be injured.

The Court unqualifiedly charged that "the servant or employee does not undertake to incur the risks arising from the negligence in providing or maintaining a suitable and safe place for his work" (Assignment No. 55 p. 24 herein; P. R. pp. 423-5). This charge is inaccurate when viewed in the light of the decision of the Federal Supreme Court:

"It is inaccurate to charge without qualification that a servant does not assume a risk created by his master's negligence, the rule being otherwise where the negligence and danger are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

C. R. I. & P. Ry Co. v. Ward, 252 U. S. 18, 22.

This instruction further charged that it was the defendant's duty to "exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find * * * that the place where he was required to work was dark and badly lighted, and that the condition of the light prevented the plaintiff from discovering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff." Did this not, in effect, direct a verdict for plaintiff, conditioned only upon the contingencies, that the jury find that the place of work was dark and badly lighted, that that fact

prevented plaintiff's discovering the condition of the appliance, and that the appliance was defective? The charge considered neither the factor of defendant's negligence nor the factor of plaintiff's assumption of the risks that he knew or appreciated, and which were attendant upon the place of work. *Del. L. & W. R. Co. v. Tomasco*, 256 Fed. 14, 17, certiorari denied, 251 U. S. 551; *Glenn v. C. N. O. & T. P. R. Co.*, 163 S. W. (Ky.) 461. Were not plaintiff's knowledge and experience, even if confined entirely to the period from seven o'clock of the previous evening until one o'clock of the following morning when he was injured, more than sufficient to permit him, even force him, to appreciate the simple fact that he could not see the coal tub as well in the dark as in the light? His testimony does not disclose such blind stupidity. No element is involved of an unknown pitfall or hole into which plaintiff might stumble or fall. The question as to whether darkness or light prevailed simply enters into the proposition as to whether plaintiff could see the coal tub in the dark as well as he could in the light.

The Court charged, after defining "a risk ordinarily incident to the employment," that "if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than his own negligence, if any, this would not be a risk which he assumed as incident to his employment." (Assignment No. 57, p. 26 herein; P. R. p.

426). The jury was thus left to infer that, if the defendant were guilty of any negligence at all or of any kind of negligence contributing to the injury, then the plaintiff assumed none of the risks incident to his employment. An instruction of very similar import was given in *Columbia & P. S. Ry. v. Sauter*, 223 Fed. 604, 610, and this court stated that an instruction to such effect was contrary to the principles of common law respecting the doctrine of assumption of risk, as reaffirmed by the United States Supreme Court in *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 504, 58 L. ed. 1062, 1070.

(B) Plaintiff assumed the dangers normally and necessarily incident to his occupation, even though the risks were extraordinary.

The foregoing authorities unqualifiedly support the doctrine that plaintiff assumed the dangers normally and necessarily incident to his occupation.

The Court's charges (Assignments 54 and 57, pp. 24-26 herein; P. R. pp. 423-427) plainly ignore that principle of law, and the latter charge limits the risks to those ordinarily incident to the employment not created by defendant's negligence.

The Court further charged (Assignment No. 58, p. 27 herein; P. R. p. 428) that "Assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur, an employee is held

to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects." This charge is contradictory, and, we submit, does not clearly define the doctrine of assumption of risk. One of the premises of the charge is: "In the absence of such obvious dangers as no ordinarily prudent person would incur." This might be understood as meaning that, unless there were present such obvious dangers as no ordinarily prudent person would incur, the doctrine would not apply, or, in other words, if the coal tub with which plaintiff was working or the place in which he was working did not present dangers so obvious that ordinarily prudent persons would not incur them, then the doctrine did not apply. On the contrary, this clause may be contended to have the meaning that, if there were present such obvious dangers as no ordinarily prudent person would incur that then the doctrine would not apply; in other words, if the appliance or the place at which plaintiff was working did present dangers so obvious that no ordinarily prudent person would incur them, then the doctrine would not apply. *Spindin v. A. R. Co.*, 148 P. (Kan.) 747.

This definition is incorrect and does not comport with that of the United States Supreme Court, viz.:

“On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman,—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.”

Seaboard A. L. R. Co. v. Horton, supra.

By this instruction the doctrine is limited to ordinary dangers. The language of the Supreme Court just quoted contains no such limitation, and, moreover, that Court has had occasion to specifically state that extraordinary risks are included in the doctrine.

“Under the Federal Employers’ Liability Act, except in the cases specified in Section 4, the employee assumes extraordinary risks incident to his employment and risks due to negligence of employer and fellow employees, when obvious or fully known and appreciated by him.”

Bolt v. P. R. R. Co. 245 U. S. 440, 445, 62 L. ed. 385.

(C) Defendant was not a guarantor of the safety of the place or work or of the machinery and appliances of the work.

By its said charge that “the negligence of any officer, agent or employee of the defendant, other than the negligence of plaintiff himself, is the negligence of the defendant, for which it would be liable” (Assignment No. 54, p. 24 herein; P. R. p. 423), and by its further charge that the plaintiff should have a verdict if “the defendant * * * or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which it knew to be defective or which its officers, agents, or employees, whose duty it was to superintend the plaintiff’s work, knew to be defective, or which, by the exercise of reasonable diligence, the defendant or its officers, agents or employees superintending said work, might have known to be defective and liable to drop the handle of said iron bucket when so being used in said work, and that in consequence of said defect the

plaintiff, while exercising ordinary care, was injured while in the performance of his duty" (Assignment No. 56, p. 25 herein; P. R. p. 425), the Court substantially told the jury that defendant was a guarantor of the safety of the place of work, and of the machinery and appliances used in the work.

The charge did not limit defendant's duty to the exercise of reasonable care to furnish reasonably safe tools and appliances, but imposed upon defendant the duty to furnish reasonably safe tools, &c. As stated by the Circuit Court of Appeals of the Eighth Circuit,

"Actionable negligence is nothing but a breach of the duty to exercise reasonable care. It is not a breach of a guaranty of the character of place or of appliances. If a duty to provide a reasonably safe place or reasonably safe appliances were imposed upon the master, he would become, in effect, a guarantor of their reasonable safety, because his failure in any respect to make and keep them reasonably safe would be a breach of that duty and would cast him in damages, however great were his watchfulness and diligence. This is not the legal measure of the master's duty or liability. The limit of his duty is to exercise ordinary care, having regard to the hazards of the service, to provide the servant with reasonably safe working places, machinery, tools, and appliances, and to exercise ordinary care to maintain them in a reasonably safe condition of repair. Citing cases."

Armour & Co. v. Russell, 144 Fed. 614, 75
C. C. A. 416.

Clearly the First Employer's Liability Act did not cast the responsibility of being a guarantor upon the employer any more than did the Second Employer's Liability Act. That the latter Act did not do so, is well established by the United States Supreme Court.

"The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. Citing cases. To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error."

Seaboard A. L. R. Co. v. Horton, supra.

(D) Recovery barred by voluntary acceptance of danger or by acquiescence therein or by disregard of orders.

Defendant specifically requested instructions, all of which were refused, that the jury be charged that plaintiff could not recover if he knowingly selected a dangerous way of moving the coal tub (Assignment No. 35, p. 12 herein; P. R. pp. 394-395), and that he could not recover if he knowingly disregarded instructions as to the manner of moving said tub (Assignment No. 36, p. 13 herein; P. R. pp. 395-396); and that he could not recover if, with knowledge of the danger and with appreciation of the risk thereof, he continued to work without objection or without defendant's promising to remedy the defect, or, if such was made, for an unreasonable time thereafter without such defect being remedied (Assignment No. 39 p. 15 herein; P. R. p. 398); and if he learned of the dangers or they were such as he ought to have known in the course of his employment, that he assumed the risk thereof (Assignment No. 40, p. 16 herein; P. R. p. 399), and instructions relative to plaintiff's appreciation of the risks of his employment. (Assignments No's. 37 and 38, p. 14 herein; P. R. pp. 396-397).

These instructions, we submit, should properly have been given under the circumstances of the case. The evidence discloses that the appliance in

question was not a complicated piece of machinery, but was only a coal tub. There can be no question that an ordinarily prudent person would have appreciated the risk of having the bail fall upon his person, and that the bail would likely fall from an upright position when the tub was being moved across the floor of the hold. Such risks were too plainly observable for it to be seriously urged that a man with the knowledge and experience of plaintiff in handling plumber's tools, shovels, hooks, picks, etc., would not have appreciated the commonplace fact that the bail of any bucket is likely to be jarred loose when the bucket is moved in a horizontal plane. We submit that plaintiff was clearly charged with the assumption of the risk attributable to the bail of the bucket falling from its horizontal position, and that the instructions requested correctly stated the law and that defendant was entitled to have the jury so charged.

Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 98, 58 L. ed. 521, 524;

Seaboard A. L. R. Co. v. Horton, *supra*;

Jacobs v. Southern R. Co. 241 U. S. 229; 60 L. ed. 970, 976;

(E) *Conflicting instructions that furnish no correct guide are erroneous.*

Contention may be made, however, that the Court subsequently substantially granted these requests by its instructions Nos. 27 to 32, inclusive.

(P. R. pp. 432-434). Without conceding that the language of those instructions covers the language of the requested instructions, we submit that, even if such concession were made, the instructions so given do not cure the errors complained of in the instructions given by the Court, and that the conflicts and contradictions existing between those particular instructions and the instructions hereinabove specifically pointed out set up inconsistencies irreconcilable with each other, and are erroneous on that very ground. 38 CYC. 1604, 1605. And, even going further, and conceding for argument's sake that all or some of those subsequent instructions were correct, that does not shake our contention, for, as stated by Circuit Judge Sanborn, "The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed." *Armour v. Russell*, 144 Fed. 614, 75 C. C. A. 416.

X.

CONTRIBUTORY NEGLIGENCE IS A BAR TO A RECOVERY UNDER THE FIRST EMPLOYER'S LIABILITY ACT, EXCEPT WHERE THE EMPLOYEE'S NEGLIGENCE IS SLIGHT AND THE EMPLOYER'S NEGLIGENCE IS GROSS IN COMPARISON THERETO.

Section 2 of the First Employer's Liability Act provides:

to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and the defendant, and to return a verdict accordingly." (Assignment No. 51, p. 22 herein; P. R. p. 421).

The standard set up by the statute, i. e.: slight negligence of plaintiff and gross negligence of defendant, was thus eliminated and the jury virtually instructed that contributory negligence was not a bar if the plaintiff's negligence was slight, regardless of whether or not defendant's negligence was slight, ordinary or gross. A new standard was set up, i.e.: a comparison between plaintiff's negligence and the combined negligence of plaintiff and defendant.

The further charge was made that "no person shall recover damages from a common carrier under the laws in force in Alaska for a personal injury to himself, where the injury was done by his own consent, or was caused by his own negligence, without any negligence on the part of the defendant" (Assignment No. 52, p. 23 herein; P. R. p. 421). By this instruction the jury was told, in effect, that, if any negligence whatsoever existed on defendant's part, then it was immaterial to what extent the injury was due to plaintiff's own consent or negligence. An explanation was added: "but where the plaintiff and defendant are both at fault the plaintiff may still recover, provided,

he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee." (Assignment No. 52, p. 23 herein; P. R. pp. 421-422). The charge as a whole thus entirely ignored the hypothesis that the plaintiff's contributory negligence was a bar to a recovery: (a) if the negligence of both plaintiff and defendant was equal, or (b) if the plaintiff's contributory negligence was gross and that of the defendant slight in comparison thereto.

The proviso "provided he could not, by the exercise of ordinary care, have prevented the injury" does not cure the error, inasmuch as, under the standard fixed by the statute, plaintiff's negligence must be slight and defendant's negligence gross in comparison thereto in order that contributory negligence shall not constitute a bar. Plaintiff thus had the duty to exercise more than ordinary care to prevent the injury.

The further charge was made that "if you shall find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So * * * the negligence of the plaintiff is not a bar to a re-

covery, but it goes by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the defendant." (Assignment No. 53, p. 23 herein; P. R. p. 422). The statutory standard of comparative negligence was thus again completely laid to one side, and contributory negligence, regardless of degree, declared not to be a bar to a recovery.

The next charge that "Therefore, as a matter of law, the negligence of any officer, agent, or employee of the defendant, other than the negligence of the plaintiff himself, is the negligence of the defendant, and for which it would be liable" (Assignment No. 54, p. 24 herein; P. R. p. 423) went even further and, in effect, made defendant liable for its negligence under all circumstances.

A perusal of these instructions discloses, we submit, contradictions which cannot be reconciled and from which the jury could obtain no correct guide as to the application to be made by it of the doctrine of contributory negligence. These conflicts and contradictions constituted error. 38 CYC 1604, 1605; *Deserant v. R. Co.*, 178 U. S. 409, 44 L. ed. 1127. Moreover, the trend of the instructions is away from the statute until the culmination is reached in an absolute departure from the statutory standard of comparative negligence applicable to the case. The impression was thus finally left with the jury that the statute had

entirely abolished the doctrine of contributory negligence and that that defense under no circumstances was a bar to a recovery. The vice of such impressions could not have been cured by the instructions based upon the statute because no one can tell by which rule the jury was controlled. *Armour Co. v. Russell*, 144 Fed. 615, 75 C.C.A. 416.

XI.

UNDER THE FIRST EMPLOYER'S LIABILITY ACT THERE IS NO LIABILITY WITHOUT NEGLIGENCE.

Section I of the Act of June 11, 1906, specifically limits the carrier's liability to its employees: "for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect, or insufficiency due to its negligence in its cars, etc." Ch. 3073, 34 Stat. L. 232.

This language is closely akin to that used in Section I of the Second Employer's Liability Act of April 22, 1908, which provides that the employer shall be liable to the employee:

"For such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such common carrier, or by reason of any defect or insufficiency due to its negligence in its cars, etc."

Ch. 149, 35 Stat. L. 65.

Under the latter Act the Supreme Court has held that the "plain effect of these words is to condition the liability upon negligence." *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 1069.

No one will controvert the assertion that the effect of the practically similar words of the First Employer's Liability Act (above quoted) conditions the liability of that statute upon negligence.

To meet this construction defendant offered two instructions (Assignments Nos. 43 and 44, pp. 23-24, herein; P. R. pp. 400-403), both of which were refused by the Court. Inasmuch as the liability under the statute is conditioned upon negligence, then the mere happening of the accident necessarily was not an evidence of negligence, and the mere existence of a defect in the coal tub would not entitle plaintiff to recover; otherwise, there might be liability without negligence. The ordinary application of the common law rule in this respect is left more clearly open under the Act of June 11, 1906, than it is under the Act of April 22, 1908, as the latter Act has express restrictions and limitations which are absent from the previous Act. That it is left open under the latter Act is announced in *Seaboard A. L. R. Co. v. Horton*, *supra*.

The defendant requested an instruction, which was refused, that the defendant could not be guilty

of negligence unless it had knowledge of the defect, or in the exercise of ordinary care could have acquired such knowledge (Assignment No. 47, p. 26 herein; P. R. p. 404). This instruction is logically founded upon the principle that the defendant is neither a guarantor nor is it liable unless negligent; and, inasmuch as the fact of the defect itself does not constitute negligence, it is very apparent that in order to have been negligent the defendant must either have had knowledge thereof or have been able to acquire such knowledge in the exercise of ordinary care. *Reese v. Phil. & R. R. Co.* 239 U. S. 384, 60 L. ed. 384, 387; *Seaboard A. L. R. Co. v. Horton*, *supra*.

XII.

THE COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT.

At the close of the evidence the defendant moved for a directed verdict (Assignment No. 30, p. 12 herein; P. R. p. 393). In its denial of the motion the learned trial Court apparently overlooked that from the plaintiff's own evidence there were present the elements, uncontradicted, which made the question one of law for the decision of the Court and not one of fact for the decision of the jury.

Plaintiff's witness Young testified that the first bucket after going to work in the afternoon dumped its load of coal, as the result of striking the

hopper on which he was standing, causing the latch to become unfastened (P. R. pp. 72-74); that he thought the bucket dumped twice, and that then it was laid aside, but that it was put to work again sometime before six o'clock (P. R. pp. 69-71); that he called for and obtained lanyards to use on the buckets, but he used them only on two tubs because the third had nothing to which to tie the lanyard (P. R. p. 78); he said "I shouted about it as much as anybody" (P. R. p. 69), and that he complained about it, but does not state to whom. He plainly indicates that the danger from the bucket which he had in mind was of the coal spilling out on the workmen, which danger diminished as the work progressed (P. R. p. 71). His opinion that the appliance was unsafe does not disclose wherein it was unsafe. On cross examination, his recollection was that the three tubs were working during the evening, from supper time on (P. R. p. 117); that the three buckets were put in use as soon as the hold was opened up sufficiently to permit it (P. R. p. 117), and clearly intimated that there was ample light for the men to work in (P. R. p. 132). The witness left work at twelve o'clock midnight (P. R. p. 76), and was not present at the time of the accident (P. R. p. 99). Young plainly had no personal knowledge as to the bail of which tub struck plaintiff.

Plaintiff's witness Williams, who went to work at one o'clock in the morning with McHugh and was

present when plaintiff was hurt, at which time he was pushing on one side of the bucket, while plaintiff was pulling the bucket on the back end, said that the bail of the bucket fell because "it was kind of a rough place where we handled this bucket, and the jarring of it I guess loosened the bail of the bucket and it fell on his foot" (P. R. p. 133-135); that more than four bucket loads were taken out between one o'clock and the time of plaintiff's accident; that he used the same bucket all of the time (P. R. p. 145), apparently meaning while he was working with plaintiff.

Plaintiff's witness Gillis, who worked with Williams, went to work about 1:30 o'clock in the morning (P. R. p. 147). He worked with the bucket about two hours (P. R. p. 149). On cross examination he testified that the bail could not fall except toward the rear (P. R. p. 154). His testimony fails to disclose whether or not he had any personal knowledge as to the bail of which tub struck plaintiff, or as to whether or not he actually worked with plaintiff.

Plaintiff's witness Soderberg, who saw the accident (P. R. p. 160), which happened about half an hour after he went to work (P. R. p. 160), could see that the bucket was no good and he told his fellow workman: "You better get away from that; it doesn't look good to me" (P. R. p. 161); that there was nothing about the tub that could not be easily seen; no concealed mechan-

ism about it; all of it was plainly visible, all of the mechanics of the tub, except possibly the rear wheel. (P. R. p. 173).

Plaintiff's witness Klemm did not see the accident, but he saw plaintiff being helped out of the hold after the accident (P. R. p. 176). He stated that there was plenty of light in the hold (P. R. p. 182). The defect of the tub which he had in mind was so apparent that he could have found it out if he had no light at all, and by the sense of feeling (P. R. p. 187); that the first or second bucket dumped after the work was resumed at one o'clock (P. R. p. 214), and that he had some conversation with the mate about it, but the bucket was continued to be used until the cargo of coal was discharged (P. R. p. 215).

Young (P. R. pp. 108-109), Williams (P. R. pp. 142-143), Gillis (P. R. pp. 154-155), and Soderberg (P. R. pp. 168-169), all testified, in effect, that the bail was let down at the time that the buckets were being loaded with coal in the hold. Young testified that the bail could not fall toward the front of the tub (P. R. p. 83), in which he was corroborated by Williams (P. R. p. 142) and by Gillis (P. R. p. 154), and Soderberg stated that the tub was ordinarily pulled out of the hold backwards, with the bail down (P. R. p. 168-169).

Young stated that the capacity of each tub was about 1700, 1800, or 1900 pounds (P. R. p. 92), and that each tub had a capacity of about six tons per hour (P. R. p. 101), in which he was cor-

roborated by Gillis (P. R. p. 156). Williams said that he had taken out more than four tub loads when the plaintiff was injured; hence, the presumption can safely be made that it was nearly two o'clock before plaintiff was injured.

Plaintiff testified in detail as to the kinds of work in which he had engaged that he was a plumber by trade; that he had worked in a mine as handyman and made different things and timbered a 190 foot shaft; and installed an air ventilation system for the compressor room; that he worked on the Government trail, mostly doing axe work in the building of bridges and culverts; that he had worked on a mining claim; that he had done railroad station work, consisting mostly of pick, shovel and wheelbarrow work; that he had done longshoring in Cordova; that he had worked in a logging-camp, bucking and splitting wood and firing the donkey engine; that he had worked as a carpenter helper; that he had shovelled rock; that he had done road work; that he had done the plumbing for a mine manager's residence and mine bunkhouse; that he had done pipe-fitting in a mine; that he had worked in the Eska coal mine; that he had done work about a mine; that he had worked as a plumber in Seattle, Vancouver and Victoria—work of a master plumber—and was in the plumbing business in Seattle and Vancouver (P. R. pps. 189-204); that he worked from 7 o'clock until twelve o'clock midnight, and resumed work at one o'clock (P. R. 205-209); and that he had seen coal buckets before, but had

never worked with one. On cross examination he went further into detail as to the work he had done (P. R. p. 252). He stated that he had no difficulty in catching on to the work (P. R. p. 265). While claiming that he saw nothing attached to it except the bail, he admitted that he could plainly see the rear wheels of the bucket (P. R. p. 274).

Can plaintiff seriously contend that five hours continuous work with the bucket was insufficient time to make the actual condition and dangers, if any, of the bucket known to and appreciated by him? The bucket's condition had been constant during all of the time that McHugh was at work. No knowledge other than common knowledge was required to appreciate the danger of being struck by a heavy iron bail; and a bail that in fact undoubtedly had been let down every time the bucket was loaded. The bucket had been loaded with coal practically every ten to fifteen minutes during the five hours; he was a man of full age and intelligence and with adequate experience, and, moreover, according to his own witnesses, there was nothing concealed about the bucket.

These facts, we submit, plainly bring this case within the rule announced by the Supreme Court of the United States that:

“Where the conditions are constant and of long standing and the danger one that is suggested by the common knowledge which all possess, and both the conditions and the dan-

gers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for decision of the Court. Upon such a state of evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 285;

Reese v. P. & R. R. Co., 239 U. S. 463, 60 L. ed. 385;

Ry Co. v. Wiles, 240 U. S. 444; 60 L. ed. 732;

Southern R. R. Co. v. Gray, 241 U. S. 333, 60 L. ed. 1030.

CONCLUSION.

The law and the facts thus plainly revealing that, by the proceedings had herein, the defendant has been materially prejudiced to its injury, we earnestly urge that defendant is entitled to a reversal of the judgment given in the lower court. Briefly summarizing the law and the facts, we find that prejudicial errors were committed in the following respects, viz.:

1. Evidence erroneously received over defendant's objections (Points 1, 2, 3, and 4).

2. Defendant erroneously denied the exercise of its right of cross-examination (Point 5).

3. Defendant erroneously denied the exercise of its right of rebutting plaintiff's evidence (Point 6).

4. Instructions, raising issues not supported by evidence, erroneously charged over defendant's objections, and instructions, properly eliminating those issues, erroneously refused (Point 7).

5. Instructions, improperly assuming the existence and applicability of the Act of June 11, 1906, erroneously charged over defendant's objections, and instructions, properly ignoring the existence and applicability of said act, erroneously refused (Point 8).

6. Instructions, misconstruing effect of provisions of the Act of June 11, 1906, erroneously charged over defendant's objections, and instructions, properly construing that Act if it be in effect and applicable, erroneously refused (Points 9, 10 and 11).

7. Erroneous denial of a directed verdict for defendant (Point 12).

Respectfully submitted,

R. E. ROBERTSON,
A. H. ZIEGLER,
BOGLE, MERRITT & BOGLE,

Attorneys for the Alaska Steam-
ship Company, Plaintiff in Error
(Defendant below).

NO. 4051

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, a corporation,
Plaintiff in Error

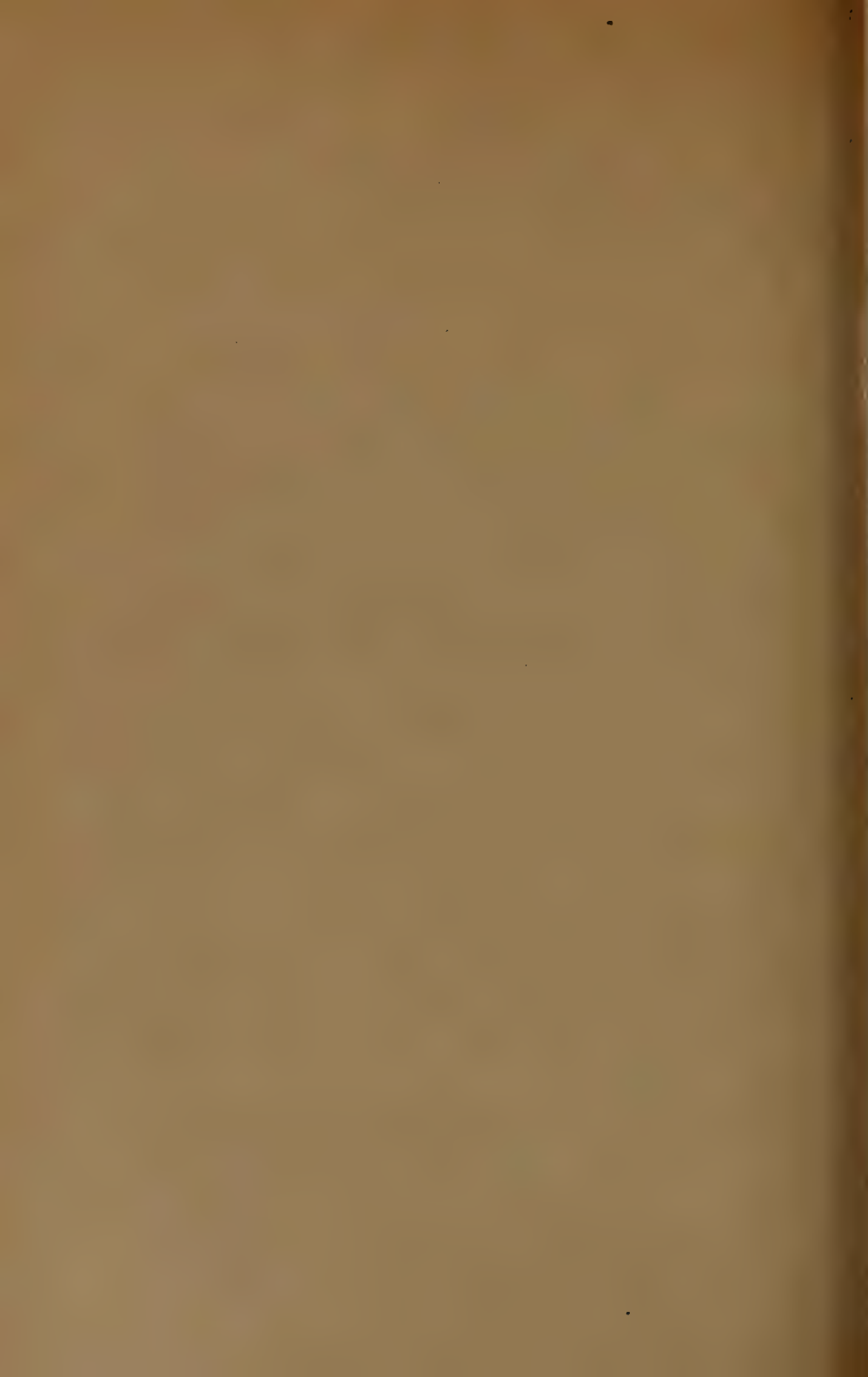
vs.

BERNARD McHUGH,
Defendant in Error

Upon Writ of Error to the United States District
Court for the District of Alaska,
Division, No. 1.

BRIEF OF DEFENDANT IN ERROR

WICKERSHAM & KEHOE
Attorneys for Defendant in Error.



NO. 4051

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Defendant in Error

Upon Writ of Error to the United States District
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BRIEF OF DEFENDANT IN ERROR

The statement of the case by counsel for the plaintiff in error is sufficient for the purposes of this brief, and therefore no such statment is made herein. Counsel presents some forty-two assignments of error by the court below, and thereafter attempts to classify all assignments under twelve general propositions of law, which he then proceeds to argue in order as given. For brevity sake we confine ourselves to the same plan, mention hereafter being made simply to the number

of the legal principle advanced by counsel for plaintiff in error.

I

The learned judge of the court below saw fit in the trial to permit the introduction of opinion evidence as to the condition of the coal bucket used by the defendant in error in the work of unloading coal from plaintiff in error's steamship, LaTouche on the 9th of March, 1922. Counsel for plaintiff in error objects and excepts to this exercise of the court's discretion. We think the introduction of such evidence was a matter which rested in the sound discretion of the trial court, and by the better authority, such action of the trial court should not be disturbed.

Swenson v. Bender, 114, Fed. 1.

"On the same principle the opinions of machinists and artisans may be received as evidence when they have by their experience gained an acquaintance with the subject not common to others, and which may aid the court or jury in coming to a conclusion. Thus, their opinions are admissible as to the proper mode of doing work * * * or whether a certain mode of operating a given machine would be safe, as well as whether the machine itself was safe." Sec. 380, Page 478, Jones on Evidence, Civil Cases.

See also:

Central Coal & Coke Co. Williams, 173 Fed. 337.

American Car & Foundry Co. v Thornton, 183 Fed. 114.

In the case of *United States Smelting Co. v Parry*, 166 Fed. 408, the court, ruling upon the admission of similar evidence, said:

“The matter next to be considered is the admission, over the defendant’s objection, of testimony by a practical brick-mason and builder of many years experience to the effect that a scaffold constructed and supported like the one in question was not as safe as those usually provided in like situations, but was very dangerous, because the weight of a man upon the projecting end of one of the planks was sure to make it tip. The objection made was, not that the witness was not qualified to speak as an expert, but that his opinion was elicited upon a matter which it was the province of the jury to decide, and which they were capable of deciding without such testimony. It is true that in trials by jury it is their province to determine the ultimate facts, and that the general rule is that witnesses are permitted to testify to the primary facts within their knowledge, but not to their opinions. And it is also true that this has at times led to the statement that witnesses may not give their opinions upon the ultimate facts which the jury are to decide, because that would supplant their judgment and usurp their province. But such a statement is not to be taken literally. It but reflects the general rule, which is subject to important qualifications, and never was intended to close any reasonable avenue to the truth in the investigation of questions of fact. Besides, the tendency of modern decisions is not only to give as wide a scope as is reasonably possible to the investigation of such questions, but also to accord to the trial judge a certain discretion in determining what testimony has a tendency to establish the ultimate facts, and to disturb his decision admitting testimony of that character

only when it plainly appears that the testimony had no legitimate bearing upon the questions at issue and was calculated to prejudice the minds of the jurors." Citing: *Holmes v Goldsmith*, 147 U. S. 150, 37 L. Ed. 118. *Williamson v United States*, 207 U. S. 425; 52 L. Ed 278. *Alexander v United States*, 138 U. S. 353; 34 L. Ed. 954. *Moore v United States*, 150 U. S. 57, 37 L. Ed. 996. *Clune v. United States*, 159 U. S. 590, 40 L. Ed. 269. And it is in keeping with this modern tendency that it is now generally held, as stated in *Chicago Great Western Ry. Co. v. McDonough* (C. C. A.) 161 Fed. 657, 662, and in the cases therein cited, that whether or not a witness tendered as an expert is qualified to testify as such rests largely in the discretion of the trial judge, and that his opinion thereon ought not to be disturbed, unless it can be said that it was manifestly erroneous.

United States Smelting Co. v. Parry, 166 Fed. 407.

Counsel for plaintiff in error cites the case of *Spokane & I. E. R. Co., v. U. S.*, 210 Fed. 243, L. R. A. 1917 A, 558-563, affirmed 241 U. S. 344; 60 L. Ed. 1037, in support of the proposition that the facts alone should have been described to the jury and the conclusion left for them to draw. The case is not in point, the question there being whether a certain appliance satisfied the requirements of the Safety Appliance Act, and not whether the appliance itself was in a safe or unsafe condition as such.

II

In the argument of the second proposition on page 35 counsel for defendant seemed not to have understood the purpose for which it was

attempted to secure the testimony objected and to which they point as error.

Beginning at page 189, Transcript, the witness McHugh was interrogated in some detail with regard to the extent and value of his work and labor in Alaska prior to the injury sued on, where he had worked, for whom, what wages he had received, what kind of work he was engaged in,—all for the purpose of fixing a standard by which the jury could determine his labor-worth prior to his injury. After a break in his testimony, by the examination of another witness out of order, at page 216, Transcript, he was called back on the stand and fully interrogated about his capacity for labor and his labor-worth and income after the injury sued for, for the purpose of giving the jury the fair standard of damage he had thus suffered in his actual earning capacity, by a comparison of his income before and after the injury.

On page 216, Transcript, he was asked:

Q. "Mr. McHugh, I wish you would tell the jury about how much money you have received for your labor that you have recounted to the jury, per annum—per year—since you have been in Alaska."

A. "About \$1800 or \$2000 a year."

Q. "Prior to the time you were hurt?"

A. "Yes, sir."

Q. "Now since that time what have you received?"

A. "Since the time I got hurt?" A. "Yes."

A. "I received nothing; I received charity."

Q. "From whom?" A. "I received charity from—"

Mr. Robertson (interrupting): "I object to that as incompetent, irrelevant and immaterial."

And after discussion between counsel and the judge the objection was sustained. The court, however, being cognizant of the purpose counsel had in trying to show the ability to earn before, in comparison with the ability to earn after the injury, on page 218, Transcript, ruled:

A. The Court—"Well, you can show a part of that, but I don't think it is relevant from whom he received it. You can show why his living was contributed to, but not the people. I don't think it is irrelevant."

Q. "Will you state to the jury, then, Mr. McHugh, why you have had to receive contributions or charity from other people?"

Objection was made, but overruled and counsel said:

O. Go ahead and state why you had to receive money that way."

A. "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work, and I had no money; at the time I left the hospital I had only \$28 of my own and other money I received afterwards, of course. I had to borrow it; that I must have in order to live."

The whole of the record about this matter will be found at pages 216-219, Transcript. The court will notice, page 216, that the word "charity" was not brought out by any question put by counsel, but was a thoughtless remark interject-

ed by defendant in an attempt to convince the court that he was not able to earn money after the injury. The statement was a surprise to counsel for plaintiff, who did not even then perceive the slant of the matter, though the court did, and sustained the objection so far as it seemed objectionable.

The witness was led to use that particular phrase, too, as an answer to the knowledge he possessed that defendant's attorneys were gathering evidence to charge him with drunkenness and other useless expenditures of money, after the injury, as was done at pages 275, 276, 355, 357 to 367, Transcript, and merely denied these charges in advance of their being offered, as they come later, by saying he had no money—that he had to borrow money from his friends, and that since the injury he was unable to work, and had to borrow money to live on.

Counsel for defendant did not move to strike nor ask for an instruction to the jury on that point, and thereby waived it.

28 Cyc. pp. 1691, 1695, 1696, Trials.

The court of its own motion gave the jury instruction No. XXVI warning the jury against being prejudiced for or against the party to the action, Page 431, Transcript. Defendant did not ask for instruction, and abandoned his objection thereby.

Hume v. United States. 170 U. S. 210; 42 L. Ed. 1011.

III

The third point made by counsel for plaintiff in error that "evidence of accidents happening after plaintiff's injury was irrevelant and inadmissible," is not without exceptions.

The general rules in such cases and the authorities in support thereof, are collected in Cyc. Vol. 29 at pages 614 to 619.

"Evidence of the condition of the place where plaintiff was injured within a reasonable time after the accident—

Little Rock, R. Co. v. Eubanks. 48 Ark. 460. 3 SW. 808.

3 Am. St. Rep. 246, twenty-one months after too remote.

Bloomington v. Osterle, 139 Ill. 120. 28 N. E. 1068. two weeks after not unreasonable time.

Lauter v. Duckworth, 19 Ind. App. 535. 48 N. E. 864, sixteen months after too remote.

Johnson v. St. Paul. 52 Minn. 364. 54 N. W. 735, four weeks after not unreasonable time.

—"is admissible for the purpose of showing its condition at the time of the injury—

Note 44 and citations p. 915. 29 Cyc.

—"in the absence of evidence of a change in the meantime.—

Note 45 and citations, p. 915. 29 Cyc.

"Acts of defendant after an accident alleged to have resulted from his negligence and are not

admissible to show antecedent negligence. The words and manner of defendant immediately after the accident are, however, admissible as part of the *res gestae*, and to show the defective condition of defendants property plaintiff may show manifestations of such property, capable of producing injury, occurring after the injury complained of.

29 Cyc. page 615 and notes 43-49.

The offer of the testimony complained about in this case was to show the conditions of the property at the very time of the injury in this case, that it was capable of producing the injury to plaintiff while yet used at the moment, and within an hour—it was part of the *res gestae*.

Counsel for plaintiff in error cites *Columbia R. R. Co. v. Hawthorne* 144. U. S. 202. 36 L. Ed. 405 in support of this proposition—that evidence of accident happening after plaintiff's injury was irrelevant and inadmissible. That, however, was not the point decided in the case of *Columbia v. Hawthorne*; the point decided then was (*italics mine*):

“In an action for injuries caused by a machine alleged to be negligently constructed, *a subsequent alteration or repair of the machine* by the defendant is not competent evidence of negligence in its original construction.”

There was no such evidence attempted to be offered in this case—the evidence was that the defendant continued to use the bucket, whose mechanism caused the injury, for an hour after the injury occurred and then laid it aside—there

was no evidence offered of "subsequent alteration or repair of the machine" and, therefore, this case is not in point on that proposition.

In the case of *District of Columbia v. Armes*, 107 U. S. 520; 27 L. Ed. 620, a member of the Metropolitan police was asked as to other accidents occurring on the spot where the defendant in error was injured. Over the objection of the city's counsel the court allowed the question to be answered in the affirmative and the Supreme Court on this point said:

"The admission of this testimony is now urged as error; the point of the objection being that it tended to introduce collateral issues and thus misled the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received; no point was made upon them; no recovery was sought by reason of them; nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition."

In passing, it is worthy of note that counsel for the plaintiff in error himself, in the re-direct examination of the witness Pollow, appearing at Page 329 of the transcript in this case, asked the following questions and received the following answers:

Q. "Now, how did these other men get hurt, Mr. Pollow?"

A. "They were doing just what I told them

not to do—pulling on the bail, pulling backwards against the pile.”

Q. “Where were you?”

A. “I was standing right on the coal pile, right in the opening of the hatch.”

Q. “Now then, how soon after McHugh came up out of the hold and you found out he was injured, did you say you went down into the hold?”

A. “Probably fifteen minutes.”

“By the weight of authority, evidence of other accidents or injuries occurring from the same cause is admissible to show that a defect in the property existed, and the possibility or probability that the injury complained of resulted therefrom.”

29 C Y C 611-612.

IV

The fourth proposition presented in counsel's brief and argument is that “evidence of changes, repairs and precautions subsequent to plaintiff's injury was irrelevant and inadmissible” and counsel again quotes from *Columbia R. R. Co. v. Hawthorne*, *supra*, on the point that evidence of “*a subsequent alteration or repair of the machine* by the defendant is not competent evidence of negligence in its original construction.”

Of course, no such evidence was offered by the plaintiff. True plaintiff's witness Williams was asked at page 138:

Q. “Was there any change made in the bucket after Barney was hurt?”

That question related to the immediate time

and was intended to bring out the fact that the buckets were so changed that the one which produced the injury was laid aside and no longer used.

This purpose was clearly stated by counsel for the plaintiff at the top of page 138, Transcript, when the objection was first made, as follows:

“Mr. Wickersham (interrupting)—I want to show simply that the bucket was laid aside.”

The witness understood the question and replied:

“A. Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was using. That left four men to the bucket and they put me on the hook.” Transcript p. 138.

Other inquiries about the bucket after the injury of plaintiff, had reference to the immediate time, all within one hour after the injury sued for, and while the bucket was in the same identical condition it was when the injury took place. The evidence related to the *res gestae*,—the conditions at the very time the injury happened and before any change was made in the machinery or bucket.

We also call the attention of the court to the evidence offered by the defendant (plaintiff in error here) at page 313 Transcript, when they asked their own principal witness:

Q. “Mr. Pollow, did you have any occasion during that night or the early morning of March

9, 1922 to examine this particular coal tub about which you have testified?"

A. "Yes, about an hour after the accident."

On the next page (Tr. 314) Pollock testified:

A. " * * * and I threw the bucket to one side that they couldn't use it any more."

Q. "How long was that after McHugh was hurt?"

A. "Well, I don't know exactly. It was about an hour."

So that all this class of testimony, as to what happened to this bucket after McHugh was hurt, related to a time within one hour after the injury, and before the bucket was discarded by the defendant's mate in charge of the unloading of the coal. It was a part of the *res gestae*.

V

Counsel's fifth general proposition is as follows: "The defendant (plaintiff in error) was entitled to cross examine plaintiff's witness as to the positiveness of his testimony." The alleged error is claimed to have occurred in the cross examination of the witness Young as shown at page 126 of the transcript. No exception was taken by counsel, nor was an objection to the ruling of the trial court made by him.

Patterson v. Hamilton, 274 Fed. 363.

The colloquy was as follows:

Q. "Do you feel as positive of that as anything else you have said in your testimony?"

Mr. Wickersham: "Oh, I object to that."

The Court: "Objection sustained."

Q. "Do you feel that you might be mistaken about that Mr. Young?"

A. "I might be mistaken with reference to

the position of the winch drivers on the deck, yes.”

Transcript 126-127.

So if it was error it was not objected to, and was cured in the next breath by the next succeeding questions and answers.

VI

Counsels sixth general proposition is as follows: “The defendant was entitled to offer evidence in rebuttal of plaintiff.” This proposition is based upon the supposed error of the trial judge in sustaining objections made by counsel for plaintiff to questions put to one Dr. Story at page 345, Transcript. But an examination of the record at that page discloses that counsel for defendant took no exception in any manner to the ruling of the court, and error cannot, of course, be based on it.

The questions asked in that paragraph are of themselves a sufficient answer to the assignment, even if there had been an exception, for they are hypothetical and not based on any evidence in the case, are leading and suggestive and had been previously substantially answered several times.

Patterson v. Hamilton. 274. Fad. 363.

VII

The seventh proposition in the brief of the plaintiff in error that “Instructions must be based upon evidence, and not upon abstract propositions of law,” seems correct enough as an

abstract proposition of law, but hardly justifies an argument of the facts submitted to the jury. He bases the argument of error on the assertion that there was no evidence "to go to the jury as to the place of work being dark and badly lighted." "An examination of the record will not disclose, we believe, any evidence upon which to base the instruction." Page 47, brief. He then proceeds to quote plaintiffs witnesses Young and Klemm about the matter, and defendant's witness Pollow, and to reargue the case. Plaintiff's witnesses, Young and Klemm, both worked on the hopper, 40 feet above the hold, from which the coal bucket ascended to them for dumping, and into which both could look, and they testified as follows:

Klemm complained to the mate about the defective bucket and on cross-examination by Mr. Robertson, for defendant:

Q. "Who did you tell that to?"

A. "Why I spoke to the mate."

Q. "Who was the mate?"

A. "Well, I couldn't tell you. It was dark down there. I couldn't recognize the mate from where I was."

Q. "How far were you away from him where you were?"

A. "I was probably thirty or forty feet. Thirty or thirty-five feet."

Page 215, Transcript.

Witness Young testified at greater length at pages 76 and 77 about light. He worked from noon till midnight, and after describing the gen-

eral darkness after 7 o'clock that night, and the want of lights near his work, testified, page 77:

Q. "What lights were below you on the boat, that you could see?"

A. "Just the lights in the hatch for the men at work."

Q. "How dark was it between you and the hatch?"

A. "Well, where I was standing it was dark; that is, after it became dark."

Q. "Well, in general, was it light or dark or unusual?"

A. "Quite dark, I would say."

Pages 76, 77, Transcript.

While the matter of bad lighting was one of the issues in the case it was not the main issue presented by the pleadings and evidence. The main issue had relation to the defective appliance provided for hoisting the coal out of the hold,—the iron bucket,—and there was ample evidence presented on that matter, and even if the evidence with respect to the want of light was not conclusive, in the estimation of the defendants counsel, the verdict is sufficiently supported by that presented in respect to the defective bucket. Plaintiff was entitled to recover on that branch of his case, even though the court should think there was scant evidence on the other, which we do not admit. Anyway there was the allegation, the theory and legal evidence in support of it, and it was the duty of the court to instruct on it as he did.

Counsel also complains in the latter part of his seventh general proposition (page 48, brief) that there was no evidence upon which to submit to the jury the matter of a permanent injury to McHugh's foot, and that the instructions, doing so, was based upon an abstract proposition of law, and therefore error.

The matter of the permanency of this injury was fully testified to by the defendant McHugh at pages 228-230, Transcript. Dr. Mustard's testimony on the same matter will be found at pages 234-239, Transcript. He testified to a bony growth between the first and second metatarsal bones of the foot—or rather on the first metatarsal bone. At page 234 the physician said of this injury:

A. "When I first saw him there was a good deal of inflammation of the lining of the membrane of the first metatarsal—the perosteum—an inflammation that is known as periostitis. This was quite severe and acute and has remained acute and severe for a good many months since that time. More recently it has become sub-acute and now the condition is what would be described as chronic."

The character of the growth is described at the bottom of page 325 and page 326, Transcript, as follows:

Q. "Is there a deposit of bone on the outside of the other bone?"

A. "The outside of the other bone, but be-

neath the lining of the membrane of the bone."

Q. "What does it resemble — a swelling or—

A. "It is newly formed bone."

At the bottom of page 236, Transcript.

Q. "When will he recover from this growth of bone? Will it ever disappear?" A. "No, sir."

Q. "It will remain with him as long as he lives?"

A. "Yes, sir."

At the top of page 239, Transcript.

Q. "Can you state to the jury whether or not that bony deposit will ever disappear?"

A. "It will never disappear."

Certainly there is evidence in support of both the bad lighting in and around the working place in the ship, and in support of the permanence of the injury to the defendant's foot, and there was no error in submitting both questions to the jury by proper instructions.

VIII

The eighth proposition in the Brief for the Plaintiff in Error (the defendant below) is that "The Act of June 11, 1906, Chap. 3073. 34 Stal. L. 232, known as the first Employer's Liability Act, was unapplicable to this case."

Counsel attempts to demonstrate that the first Act was inapplicable only because it was repealed by the later Act. At page 54 of their brief counsel says: "So far as we are informed the United States Supreme Court has never had occasion to directly pass upon the question as to whether or not the Act of June 11, 1906 was so

repealed by the Act of April 22, 1908." There is no repealing clause in the latter Act, so if the former Act was repealed it was by implication, a method of repeal which is not looked upon with special favor by the courts.

The Act of 1906 applies to all common carriers in the Territory of Alaska, and is not unconstitutional there. *El Paso Ry. Co. v. Gutierrez*, 215, U. S. 87. 54 L. Ed. 106. Note 1, Sec. 8657 Vol. 8. Comp. Stat. U. S. 1916. Page 8389. Its provisions apply to the circumstances in the case at bar. The Act of 1908 has no relation to the case at bar, and if the Act of 1906 was repealed by implication by the Act of 1908, then neither Act applies. We think, however, that Section 8 of the Act of 1908, Sec. 8664, U. S. Comp. Stat. 1916, Vol. 8, Page 9439, continues the Act of 1906 in force.

"Sec. 8664—Nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employers under any other Act or Acts of Congress, etc."

Whatever the court may think about the matter of implied repeal of the Act of 1906, the matter before the court is aided by the fact that in 1913 the Legislature of Alaska re-enacted the Act of Congress of 1906. Sess. Laws of Alaska, 1913, page 84. Sec. one and two of the Act of the Territorial Legislature are as follows: the phrases therein which are exactly taken from the Act of Congress of 1906. 34 Stat. L. 232 are italicised.

"Chap. 45.—An Act to fix the liability of employers for personal injuries sustained by their employees.

"Be it enacted, etc."

Section 1. *That every person, association, or corporation engaged in the business of manufacturing, mining, constructing, building, or other occupations carried on by means of machinery or mechanical appliances shall be liable to any of its employees, or, in the event of his death, to his personal representation for the benefit of his widow and children, if any, if none then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its or his or their officers, agents, or employers, or by reason of any defect or insufficiency due to its or their negligence in the machinery, appliances and works.*"

Sec. 2. *That in all actions hereafter brought against a master or employer such as is mentioned in the first section hereof, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.*"

Sess. Laws Alaska. 1913, Page 84.

This Act of the Territorial Legislature is valid under the 9th section of the Act of Congress of Aug. 24, 1912, to create a legislative as-

sembly in the Territory of Alaska and to confer legislative power thereon. 37 Stat. L. 512. Sec. 416. Comp. Laws Alaska. 1913, and the rules laid down in the case of *Clinton v. Englebrecht*, 13. Wall. 434, 20 L. Ed. 659.

The Act of the Territorial Legislature is valid, first, because it is within the legislative power conferred by Congress in section 9 of the organic act, and, second, because it has been approved by Congress, under the provisions of Sec. 20 of the organic act:

“Sec. 20. That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and if disapproved by Congress, they shall be null and of no effect.”

Sec. 426, Comp. Laws Alaska, 1813, page 273.

In an exactly similar situation the Supreme Court of the United States in *Clinton v Englebrecht*, *supra*, said:

“In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute books for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.”

It is more than ten years since the Territorial Act of 1913 was passed; four sessions of Con-

gress have passed, and under the rule above laid down by the Supreme Court, this court will, of course, hold the present Act to have been "approved by that body," and therefore a valid law.

IX

Counsel's ninth general proposition is that the common law doctrine of the assumption of risk applied, and that the circumstances show the plaintiff necessarily assumed the risks of the employment in which he was injured.

Swenson v. Bender. 114, Fed. 1.

The facts show that McHugh began work at 7 o'clock in the evening, and worked till 12—then had an hour off for eating and rest, and began work again at one o'clock and was injured twenty minutes later, after having worked only five hours and twenty minutes. Page 205-210, Tr. The evidence shows without contradiction that he had never had any experience in handling a coal bucket or its catch or lock before, and that the whole mechanism was new to him and was not even handled by him during the short time of his employment. Pages 205-209, Transcript.

The coal tub was about three feet square, built of iron and weighed about 600 pounds. Page 80, Transcript. The bail was of heavy iron, about three inches wide, and an inch and a quarter thick, with a heavy forged knob at its central top, wherein fitted an iron swivel and a ring for hoisting. The bail weighed about 200 pounds. Pages 82-84, Transcript.

The bucket was swung in the great bail from pins of iron on each side so it would dump, and on one side a heavy iron catch or lock held the bail upright until the trigger in the catch or lock was operated when the bucket swung loose and if loaded would turn over and spill its contents. The two hopper men testified the catch, trigger or lock was out of order, causing the bucket to swing loose and voluntarily dump its load. Young at pages 71-74, and Klemm, page 179, Transcript. and both informed the defendants mate of that fact. Young at pages 69-70 and Klemm at page 214, Transcript.

Under these clearly established facts, the court properly refused to instruct the jury that McHugh had assumed the risks incident to the management of the iron bucket and its worn and broken catch, lock or trigger, with which he was totally unacquainted and with whose working he had no part or control.

Swenson v Bender, *supra*.

While we think the matter at issue is controlled by section 1 and 2 of the Federal Employers Liability Act of 1906, and by Territorial Act of 1913, *supra*, yet the case seems clear under the authorities cited by counsel for defendant. His first citation under this head is the case of *Jacobs v. So. Ry. Co.* 241, U. S. 229, 60 L. Ed. 970 and in that case the court held:

“2. A railway fireman injured by stumbling

over a pile of cinders between the tracks while attempting to board a moving engine with a can of drinking water in his hand assumes the risk of the situation when he knows of the custom to deposit cinders between the tracks, and knows of their existence, although he may have forgotten their existence at the time, and does not notice them."

On the next page counsel cites *Butler v Frazer* 211 U. S., 459, 53 L. Ed. 281, 285, as laying down the correct rule in such cases as that at bar. In this case the court said:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate and assume the risk of it. *Texas & P. R. Co. v. Swearingen*, 196, U. S. 51, 49 L. Ed. 382, 25 Sup. Ct. Rep. 164, *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 31 Am. St. Rep. 537, 29 N. E. 464. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

Under the principles of law announced by the Supreme Court in the foregoing case, and the facts in the case at bar, it is plain there was no assumption of risk by the plaintiff McHugh and therefore no error in refusing to give defendants requested instructions.

The same conclusion must follow from an application of the quotation from the case of *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492. 58 L. Ed. 1062 found on page 67 of the Brief of Plaintiff in error in this case.

Counsel also complains at page 68 Brief that: "(C) Defendant was not a guarantor, etc." This matter was fully covered by instructions given by the court in No. 27 and other instructions. Page 432, Transcript.

The trouble with counsel's objections to the courts instruction is they object to an instruction and argue that, when other instructions given cure the very defect they attempt to argue. These instructions as a whole cover every objection made by counsel.

Swenson v Bender, supra.

X

Counsel's tenth general proposition is that—"contributory negligence is a bar to recovery under the first Employer's Liability Act, except where the employee's negligence is slight and the employer's negligence is gross in comparison."

As we understood it, counsel base their com-

plaint to the instructions under this head, (page 75, Brief, last paragraph) on their own error in quoting only the last sentence from Instruction No. X page 421, Transcript, and then criticising the court for a supposed failure to give the first sentence. Counsel also makes this criticism at page 76, Brief: "The standard set up by the statute ie., slight negligence of plaintiff and gross negligence of the defendant, was thus eliminated and the jury virtually instructed that contributory negligence was not a bar if the plaintiffs negligence was slight, regardless of whether or not defendants negligence was slight, ordinary or gross. A new standard was set up, ie., a comparison between the plaintiffs negligence and the combined negligence of plaintiff and defendant."

Fortunately for the trial judge that error, if error it is, was not made by him, but by the Supreme Court of the United States in the case of *Norfolk & W. R. Co v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 1101, where that court suggested and approved the use of those words in an instruction drawn under the second Employer's (Railroad) Act of 1908, in relation to the common phrase used in both Acts, and in the Territorial Act.

Counsel also criticise another instruction at the bottom of page 77 and top of 78, Brief, but, again, the language criticised is from *Norfolk & W. R. Co. v Earnest*, *supra*, as amended and approved in that case.

The liability of a steamship company for death of a sailor, injured while in its employ on a vessel operating as a common carrier in Alaska, is controlled by the provisions of Employer's Liability Act, June 11, 1906. Sec. 1-4.

Sandstrom v Pacific SS. Co., 260 Fed. 661.

A person who has a cause of action of admiralty cognizance has always been entitled to seek his remedy in either the common law courts, where they are competent to give it, or in the admiralty courts.

The Erie Lighter 108. 250 Fed. 490.

We think most of the voluminous objections made by counsel for plaintiff in error are within the brief but accurate syllabi in the case of *Humes v United States*. 170 U. S. 210. 42 L. Ed. 1101, as follows:

"1. The omission of the court to give instructions which are not asked for is not error.

"2. Instructions given, but not excepted to, are not subject to review.

"3. Refusal of instructions requested is not error, when the instructions already given are sufficiently full and elaborate.

"4. The court cannot consider whether the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict."

Humes v. United States, *supra*.

XI

Counsels eleventh general principle seems rather self-evident, and his criticism is fully cov-

ered by instructions given by the court. Numbers VIII, IX and XII, pages 420-22, Transcript.

XII

The last general objection in counsels brief, page 81, is that: "the court should have directed a verdict for the defendant," upon which they proceed to reargue the case to this court on the evidence. The last item in the syllabi in the case of *Hume v. United States*, *supra*, is:

"4. The court cannot consider whether the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict."

Certainly there was not only proper evidence to go to the jury in this case but an overwhelming weight of the evidence was in favor of the plaintiff.

In conclusion:

We submit that the Act of Congress of June 11, 1906—the first Federal Employers Liability Act, the same act re-enacted by the Territorial Legislature of Alaska in 1913, and thereafter given implied approval by Congress, the cases of *Swensen v. Bender*, 114, Fed. 1; *Norfolk & W. R. Co. v Earnest*, 229, U. S. 114, 57 L. Ed. 1096 and *Hume v. United States*, 170 U. S. 210, 42 L. Ed. 1011, conclude all questions raised by counsel for plaintiff in error, defendant below, in their brief. We have assumed that all questions not presented in their brief are waived.

Counsel for defendant in error, plaintiff below, submit the case to the judgment of the court on the record, the brief of opposing counsel, and this printed brief and argument, and waive oral argument.

WICKERSHAM & KEHOE

Attorneys for Defendant in Error.

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 4051

ALASKA STEAMSHIP COMPANY, a cor-
poration, *Plaintiff in Error*
vs.

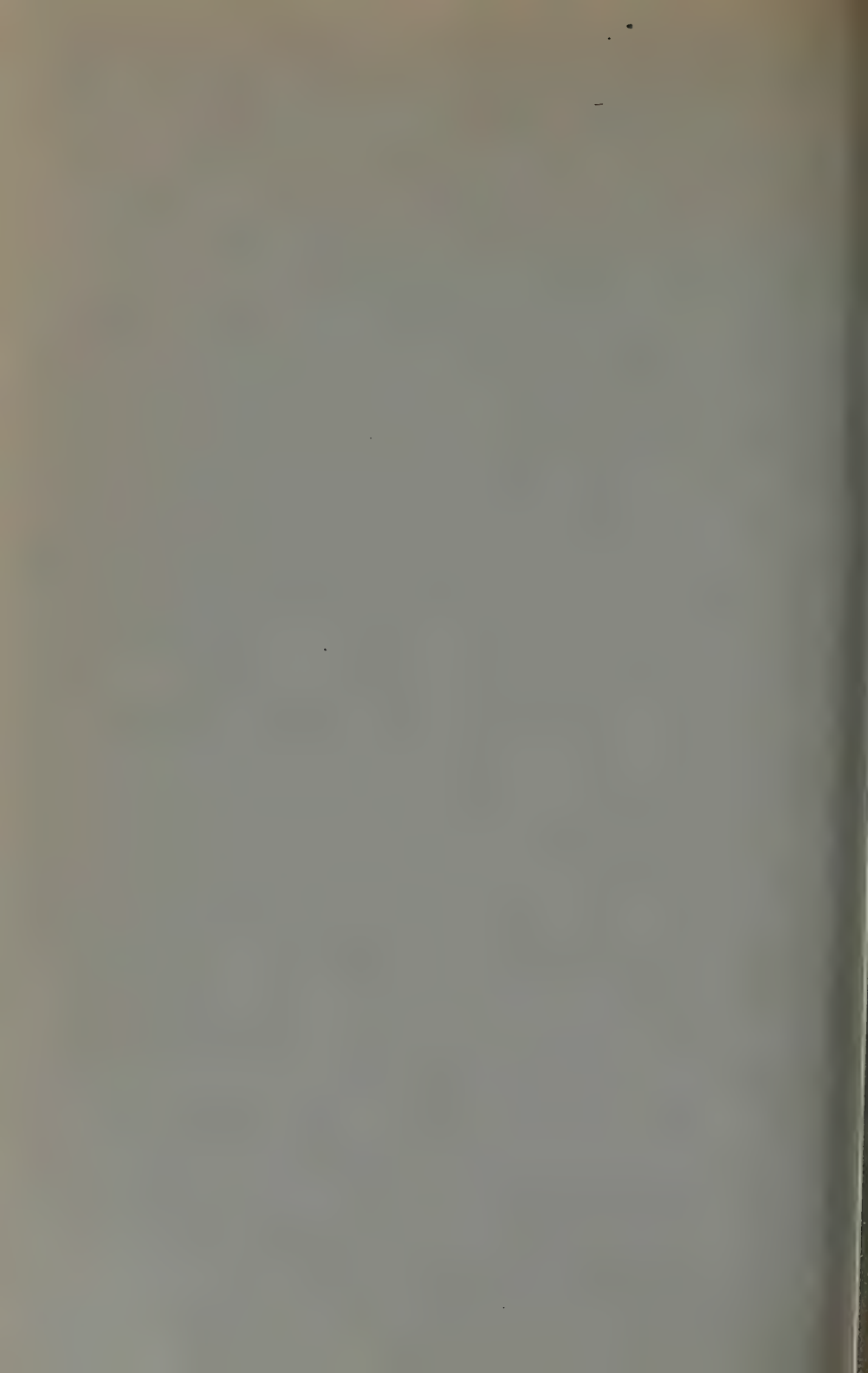
BERNARD McHUGH, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE DIS-
TRICT OF ALASKA, DIVISION NO. ONE

Reply Brief of Plaintiff in Error

BOGLE, MERRITT & BOGLE
ATTORNEYS FOR PLAINTIFF IN ERROR

609-616 CENTRAL BUILDING, SEATTLE, WASHINGTON



In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 4051

ALASKA STEAMSHIP COMPANY, a corporation,
Plaintiff in Error
vs.

BERNARD McHUGH, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NO. ONE

Reply Brief of Plaintiff in Error

As indicated upon oral argument of this case, one of the principal questions presented by the present writ of error is whether the Federal Employers' Liability Act of 1906 is effective or operative in the Territory of Alaska with respect to an action against a common carrier for personal injuries based upon a maritime tort as distinguished from one founded upon non-maritime tort. Upon this

opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail *throughout* the country. * * * And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. * * *

“In *The Lottawanna*, Mr. Justice Bradley, speaking for the court said: ‘That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend ‘to all cases of admiralty and maritime jurisdiction.’ * * * One thing, however, is unquestionable; the *Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country.* * * *’” (Italics ours.) *Southern Pac. Co. v. Jensen*, 61 L. Ed. 1086, 1098.

Following the opinion above quoted, the case of *Chelentis v. Luckenbach S. S. Co.*, 62 L. Ed. 1171, was decided, wherein the Supreme Court of the United States quoted from its former opinion and again, in very positive language, announced that the harmony and uniformity in the maritime law may

not be disturbed, since it was uniformity and consistency which was sought by the Constitutional grant.

“In *Southern P. Co. v. Jensen*, * * *; *Chelentis v. Luckenbach S. S. Co.*, * * *; *Union Fish Co. v. Erickson*, * * *, and *Knickerbocker Ice Co. v. Stewart*, * * *, we have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the states to change its general features *so as to defeat uniformity*, but the power of a state to make some modifications or supplements was affirmed. And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling whenever suit may be instituted.” (Italics ours.) *Western Fuel Co. v. Garcia*, 66 L. Ed. 210, 213, 214.

In *Grant Smith-Porter Ship Co. v. Rohde*, 66 L. Ed. 321, death resulted from injury resulting on board an incompleated hull, and was suffered by a man employed in constructing the vessel, which facts resulted in the Supreme Court holding that the services of the workman were non-maritime; upon the particular facts in that case, it was held that to apply the state death statute would not work material prejudice to the uniformity of the maritime law. However, that the first essential to the system of admiralty and maritime laws of the

United States is uniformity, was reiterated in the opinion. The language of the opinion says:

“This conclusion accords with *Southern P. Co. v. Jensen*, * * *; *Chelentis v. Luckenbach S. S. Co.*, * * *; *Union Fish Co. v. Erickson*, * * *, and *Knickerbocker Ice Co. v. Stewart*, * * *. In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law can not materially affect any rules of the sea whose *uniformity is essential*.” (Italics ours.) *Grant Smith-Porter Ship Co. v. Rohde*, 66 L. Ed. 321, 325.

In the case of *State Industrial Commission v. Nordenholt Corp.*, 66 L. Ed. 933, since the injuries for which compensation was sought occurred on the dock and not upon navigable waters, it was held that the state compensation law did not work prejudice to the uniformity of the general maritime law, and therefore might afford a remedy to the injured man. Here again, however, the essential feature of the maritime law is recognized.

“Under the doctrine approved in *Southern P. Co. v. Jensen*, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indem-

nity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' " *State Industrial Commission v. Nordenholt Corp.*, 66 L. Ed. 933, 937.

It may be suggested that the language of the cases cited was used with respect to state statutes or decisions, and that hence it is not binding upon this court in passing upon the application of the Federal Employers' Liability Act of 1906 in the present action. But beyond dispute the cases quoted show that by the United States Supreme Court the law is established to be that the Constitutional grant of admiralty and maritime jurisdiction to the federal government was intended for the purpose of preserving and developing uniformity and harmony in principles and rulings in that field, as well as in other matters entrusted to the national government and released by the several states.

Somewhat analogous to the Federal Employers' Liability Act of 1906 is that part of the Act of 1879 (Judicial Code, § 24 and § 256), known as the "saving clause." Both were enactments of

Congress. Both would, if given the meaning usually sought by personal injury plaintiffs, result in inconsistency in the operation of the maritime law in various jurisdictions. In many early opinions examination shows that the courts thought the "saving clause" preserved to a suitor the right to a common-law cause of action, varying in different states as the common law there was adopted and construed. Why was this Federal statute under which conflict interpreted otherwise—to preserve the uniformity of the maritime law. [*Schuede v. Zenith S. S. Co.*, 216 Fed. 566 (affirmed 61 L. Ed. 1369); *Chelentis v. Luckenbach S. S. Co.*, 62 L. Ed. 1171. By these decisions and others subsequently it has, in effect, been said that the "saving clause," although a national statute, may not disturb the uniformity of the maritime law.

Again, when by amendment to the "saving clause" through the Act of October 6, 1917, attempting to permit suitors suffering personal injuries from maritime torts to receive awards under state compensation laws, a federal statute was held invalid because in violation of the spirit of the Constitution which demands a national system of maritime laws uniform throughout the country. This conclusion was reached in the case of *Knickerbocker*

Ice Co. v. Stewart, 64 L. Ed. 834, where the court said:

“In *Southern P. Co. v. Jensen* (May, 1917) supra, we declared that under § 2, article 3, of the Constitution (‘the judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction’), and § 8, art. 1 (Congress may make necessary and proper laws for carrying out granted powers), ‘in the absence of some controlling statute the general maritime law as accepted by the Federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction:’ also that ‘Congress has paramount power to fix and determine the maritime law which shall *prevail throughout the country.*’ And we held that, when applied to maritime injuries, the New York Workmen’s Compensation Law conflicts with the rules adopted by the Constitution, and to that extent is invalid. ‘The necessary consequence would be *destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish*; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded.’ * * *

“In *Chelentis v. Luckenbach S. S. Co.* (June, 1918), 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. Rep. 501, an action at law seeking full indemnity for injuries received by a sailor while on ship-board, we said: ‘Under the doctrine approved in *Southern P. Co. v. Jensen*, no states has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full

indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and *it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."* And, concerning the clause, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it,' this: 'In Southern P. Co. v. Jensen, we definitely ruled that it gave no authority to the several states to enact legislation which would work "material prejudice to the characteristic features of the general maritime law, or *interfere with the proper harmony and uniformity of that law in its international and interstate relations.*"' * * *

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of

the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

“Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states,—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. ‘That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable: the Constitution must have referred to a *system of law coextensive with, and operating uniformly in, the whole country.*’
* * *

“And, so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. *The definite object of the grant was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.*

“Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their character-

istic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation *which embodies both the will and deliberate judgment of Congress*. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established,—*it would defeat the very purpose of the grant.*" (Italics ours.) *Knickerbocker Ice Co. v. Stewart*, 64 L. Ed. 834, 838-841.

One of the objections noted by the Supreme Court in the case last quoted to allowing Congress to make operative compensation laws of the several states, is that such legislation as the Act of October 6, 1917, would permit to be operative without the deliberate judgment and will of Congress various state statutes. We think this remark of the supreme court is particularly pertinent in the present case in view of the fact that it certainly cannot be said that it was the intention of Congress to create any lack of uniformity in the maritime laws of the United States by making the Federal Employers' Liability Act of 1906 operative in the territories as to maritime torts, when the Act as

originally passed by Congress contemplated its validity not only in the territories but also in the states. The very purpose of the Act was to create uniformity rather than to destroy it.

With respect to the former decision of this court in the case of *Sanstrom v. Pacific Steamship Co.*, 260 Fed. 661, we find no inconsistency between the contention being made here by plaintiff in error and that previous decision. In the *Sanstrom* case it was only necessary for this court to hold that the plaintiff's cause of action was barred by the statute of limitations contained in the Federal Employers' Liability Act of 1906. So far as shown by the opinion it was not necessary to hold that the Act was in force to the extent of creating a cause of action for the injured man or of circumscribing the defenses of the defendant steamship company.

If the opinion by this court is deemed to mean that the Federal Employers' Liability Act of 1906 was entirely operative in Alaska and controlling as to the cause of action of one suffering injuries as result of maritime tort, then we must contend that the cases cited by the opinion decided by the Supreme Court of the United States do not support the conclusion of this court, because the cases cited

were both cases arising from non-maritime torts, one suffered by a railroad employe in the territory of New Mexico, and the other by a street railway employe in the District of Columbia.

However, as we interpret the opinion in the Sanstrom case, it is good law, established and recognized by other decisions of the courts of the United States, if it is read as meaning that although Sanstrom's cause of action was created by the maritime law unmodified by statute, the court in enforcing that law was permitted to resort to the non-maritime statutes in force within the territory to ascertain whether the plaintiff had been guilty of laches; for it has become settled that in entertaining suits filed either in admiralty or at common law upon claims for personal injuries or property damage, where the causes of action arise by virtue of the general maritime law entirely unaided by statute, the courts to determine whether the litigation has been instituted timely, may resort to local or non-maritime analogous statutes. Examples of such decisions are found in the following cases:

The Keith City, 14 Wall. 653, 20 L. Ed. 896.

The Southwark, 128 Fed. 149.

Davis v. Smokeless Fuel Co., 196 Fed. 753.

Lincoln v. Cunard S. S. Co., 221 Fed. 622.

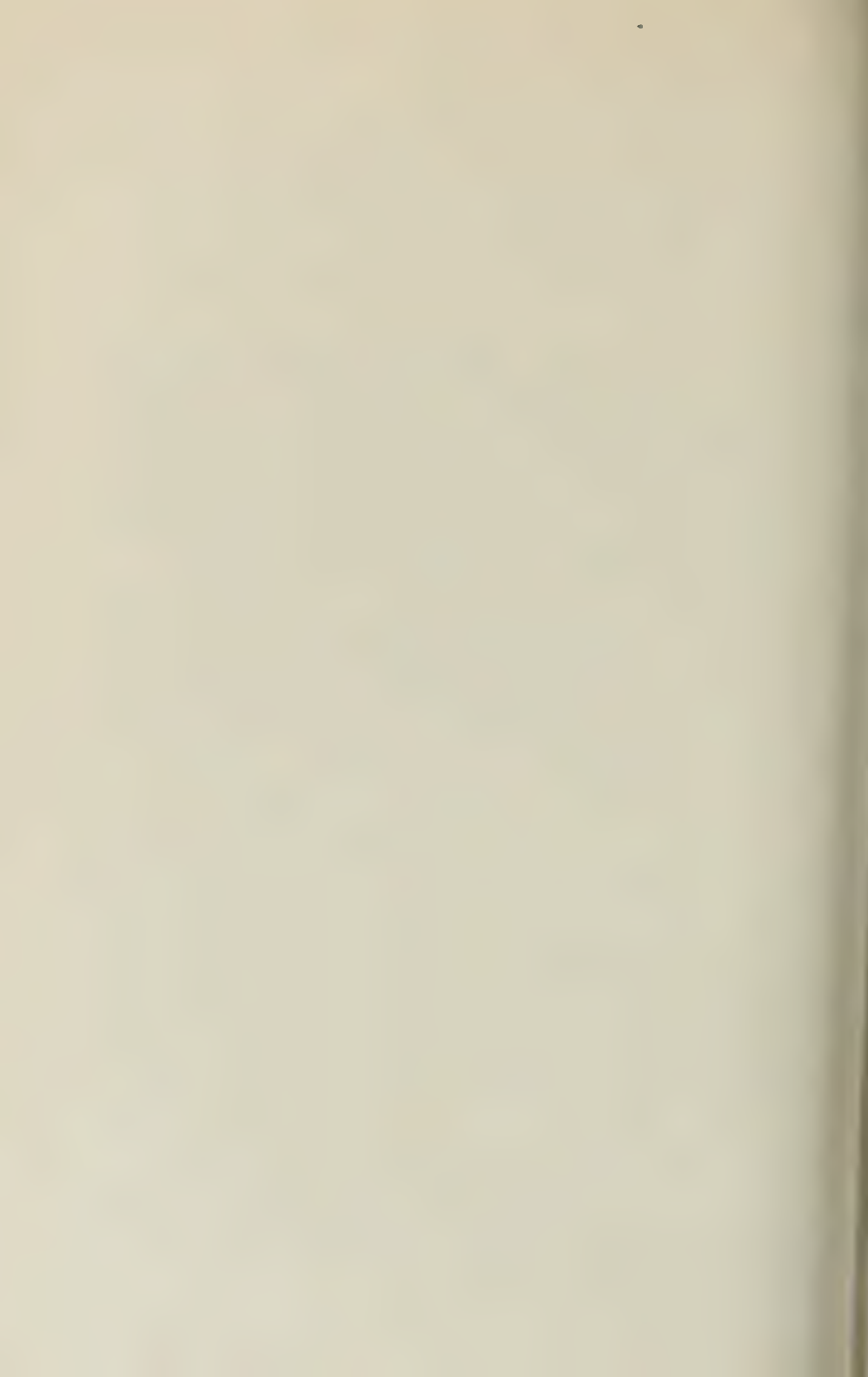
Elder, etc., Co. v. Talge Mahogany Co., 256
Fed. 65.

Bonam v. Southern M. Corp., 284 Fed. 362.

Plaintiff in error therefore respectfully submits that the Federal Employers' Liability Act of 1906 was not operative to create or control the maritime cause of action involved in the present litigation, and that the judgment of the trial court should be reversed for the errors shown in the record.

Respectfully submitted,

BOGLE, MERRITT & BOGLE,
Attorneys for Plaintiff in Error.



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN R. CORBETT, also known as J. R.
CORBETT, and NORA E. BISHOP,
alias ELLEN STONE,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Southern Division.*

No.....

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

JOHN R. CORBETT, also known as J. R.
CORBETT, and NORA E. BISHOP,
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Plaintiffs in Error,

vs.

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Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Southern Division.*

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

J. T. COOK,
S. L. TIPTON,
Boise, Idaho,
Attorneys for Plaintiffs in Error.

E. G. DAVIS, U. S. District Attorney,
Boise, Idaho,
Attorney for Defendant in Error.

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*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

February Term, 1923.

UNITED STATES OF AMERICA,

vs.

JOHN R. CORBETT, also known as J. R.
CORBETT,

Defendant.

No. 954.

INDICTMENT.

Charge: Violation, Act June 25, 1910,
White Slave Traffic Act.

The Grand Jurors of the United States of America, being first duly impaneled and sworn, within and for the District of Idaho, Southern Division, in the name and by the authority of the United States of America, upon their oaths do find and present:

That heretofore, to-wit, on or about the 20th day of January, A. D. 1923, John R. Corbett, also known as J. R. Corbett, did, knowingly, wilfully, unlawfully and feloniously transport and cause to be transported and did aid and assist in transporting a certain woman, to-wit, Nora E. Bishop, alias Ellen Stone, in interstate commerce from Spokane, in the county of Spokane and State of Washington,

and in the Eastern District of Washington, to Boise, in the county of Ada and State of Idaho, and within the Southern Division of the District of Idaho, as a passenger upon the lines of certain common carriers engaged in interstate commerce, to-wit, Oregon-Washington Railroad & Navigation Company, and the Oregon Short Line Railroad Company, with the intent and purpose on the part of him, the said John R. Corbett, also known as J. R. Corbett, to induce, entice, and compel her, the said Nora E. Bishop, alias Ellen Stone, to engage in an immoral practice, to-wit, the practice of illicit sexual intercourse with him, the said John R. Corbett, also known as J. R. Corbett, at the said city of Boise, in the State and District of Idaho.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT TWO.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further find and present:

That the said John R. Corbett, also known as J. R. Corbett, heretofore, to-wit, on or about the 11th day of January, A. D. 1923, at Boise, in the county of Ada, and State of Idaho, and within the Southern Division of the District of Idaho, did, knowingly, wilfully, unlawfully and feloniously, persuade, induce and entice a certain woman, to-wit,

Nora E. Bishop, alias Ellen Stone, to go and be carried in interstate commerce from the city of Spokane, in the State of Washington, to the city of Boise, in the county of Ada, and the State of Idaho, as a passenger upon the lines of certain common carriers engaged in interstate commerce, to-wit, the Oregon-Washington Railroad & Navigation Company, and the Oregon Short Line Railroad Company, with the intent and purpose, on the part of him, the said John R. Corbett, also known as J. R. Corbett, to persuade, induce and entice the said Nora E. Bishop, alias Ellen Stone, to engage in an immoral practice, to-wit, the practice of illicit sexual intercourse with him, the said John R. Corbett, also known as J. R. Corbett; and that the said John R. Corbett, also known as J. R. Corbett, then and there, and by means of such persuading, inducing and enticing, did, knowingly, wilfully, unlawfully and feloniously cause, and aid, and assist in causing, the said Nora E. Bishop, alias Ellen Stone, to go and be carried and transported from the City of Spokane in the State of Washington, to the City of Boise, in the county of Ada, and State of Idaho, and within the Southern Division of the District of Idaho, in interstate commerce as a passenger upon the lines of certain common carriers, to-wit, the Oregon-Washington Railroad & Navigation Company, and the Oregon Short Line Railroad Company.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

E. G. DAVIS,

*United States Attorney, for the
District of Idaho.*

RUSSELL M. ASH,

*Foreman of the United States
Grand Jury.*

WITNESSES EXAMINED BEFORE THE
GRAND JURY IN THE ABOVE CASE:

R. B. McCUTCHEON,
A. A. IMUS,
GEORGE A. DAY,
L. C. FLORA,
W. H. MINIELY,
MAX H. WASSON.

“INDICTMENT

Violation Act June 25, 1910—White Slave Traffic.

E. G. DAVIS,
U. S. Attorney.

A true bill.

RUSSELL M. ASH,
Foreman.

Presented by the foreman in open court and filed
in the presence of the grand jury this 15 day of
Feby., 1923.

W. D. McREYNOLDS,
Clerk.

By _____,
Deputy Clerk.”

Endorsed, Filed Feb. 15, 1923,
W. D. McREYNOLDS, Clerk.

*In the District Court of the United States in and
for the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA,

vs.

JOHN R. CORBETT, also known as J. R.
CORBETT, and NORA E. BISHOP,
alias ELLEN STONE,

Defendants.

No. 995.

INDICTMENT.

Charge: Violation Section 37,
Penal Code.

Conspiracy to Commit Offenses against the
United States.

The Grand Jurors of the United States of America, being first duly impaneled and sworn, within and for the District of Idaho, Southern Division, in the name and by the authority of the United States of America, upon their oaths do find and present:

That heretofore, to-wit, at Boise, County of Ada, State and District of Idaho, Southern Division, and within the jurisdiction of this Court, John R. Corbett, also known as J. R. Corbett, and Nora E. Bishop, alias Ellen Stone, did, then and there, wilfully, knowingly, unlawfully and feloniously, conspire, combine, confederate and agree together to commit an offense against the United States of America, to-wit, to violate the Act of Congress known as the White Slave Traffic Act (Act of June 25, 1910, 36 Stat. 825), in the following manner and particulars:

That the said John R. Corbett, also known as J. R. Corbett, and the said Nora E. Bishop, alias Ellen Stone, did, at the time and place aforesaid, conspire, combine and agree together that the said Nora E. Bishop, alias Ellen Stone, should go and

be transported in interstate commerce from the City of Spokane, in the State of Washington, to the City of Boise, County of Ada, State and District of Idaho, Southern Division, and within the jurisdiction of this Court, and that the said John R. Corbett, also known as J. R. Corbett, should knowingly transport, and cause to be transported and aid and assist in transporting the said Nora E. Bishop, alias Ellen Stone, from the said City of Spokane, in the State of Washington, to the said City of Boise, in the State and District of Idaho, Southern Division and within the jurisdiction of this Court, as a passenger upon the lines of a certain common carrier engaged in interstate commerce, to-wit, the Oregon-Washington Railroad & Navigation Company, and the Oregon Short Line Railroad Company, with the intent and purpose on the part of him, the said John R. Corbett, also known as J. R. Corbett, to induce, entice and procure the said Nora E. Bishop, alias Ellen Stone, to give herself up to debauchery and to other immoral practices.

That after the formation of said unlawful conspiracy and in pursuance thereof, and to effect the object and purpose thereof, he, the said John R. Corbett, also known as J. R. Corbett, on January 11, 1923, deposited with the Western Union Telegraph Company, at Boise, Ada County, Idaho, and within the Southern Division of the District of

Idaho, for transmission to Spokane, Washington, the following application for money transfer, to-wit:

A personal or business message may be incorporated in the money transfer for a small added charge.

Number 41
Time
Filed 3:01 P. M.
Received
by K.

WESTERN UNION
MONEY TRANSFER

Principal	\$20.00
Transfer	
Charges	\$.25
Telegram	
Tolls	\$ 1.13
Tax	\$.10
Total	
Charges	\$21.48

Newcomb Carlton
President

George E. W. Atkins,
First Vice-President.

THE WESTERN UNION TELEGRAPH CO.

Subject to the conditions on back hereof,
which are hereby agreed to.

Boise, Ida., Jan. 11, 1923.

Pay to ELLEN STONE

Street and No. 3809 East Liberty St.
Place Spokane, Washington.

(Amount) Twenty Dollars and no cents (\$20.00)

And DELIVER the following message to payee
at the time of payment.

Sending money to come home on wire when you
start.

Signature

J. R. Corbett,

Sender's Address

Capital Hotel.

Positive evidence of personal identity will be required from the Payee UNLESS the following waiver is signed.

WAIVER OF IDENTIFICATION

I desire that the above named payee shall not be required to produce positive evidence of personal identity and hereby authorize and direct the Telegraph Company to pay the sum named in this order at my risk to such person as its agent believes to be the above-named payee.

Signature

J. R. Corbett.

TRANSFER AGENT'S COPY—NOT FOR TRANSMISSION.

And pursuant further to the aforesaid conspiracy, combination, confederation and agreement, and to effect the object and purpose thereof, he, the said John R. Corbett, also known as J. R. Corbett, on the 14th day of January, 1923, at Boise, in the County of Ada, and State of Idaho, and within the Southern Division of the District of Idaho, delivered to the Western Union Telegraph Company at Boise, Idaho, for transmission to Spokane, Washington, the following telegram:

Class of Service
desired
Telegram
Day Letter
Night Message
Night Letter

WESTERN UNION
TELEGRAM

Newcomb Carlton,
President

Receiver's No.
S
Check

14
Time filed
1923 Jan. 14 AM
8:12

George E. W. Atkins,
First Vice-President.

Send the following message, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, Jan. 14, 1923.

To

Ellen Stone

Street and No. 3809 East Liberty St.
Place Spokane, Wash.
no do not think so at this time com
as soon as you can.

J. R. Corbett.

And pursuant further to the aforesaid conspiracy, combination, confederation, and agreement and to effect the object and purpose thereof, he, the said John R. Corbett, also known as J. R. Corbett on or about the 20th day of January, A. D., 1923, at Boise, in the County of Ada, and State of Idaho, and within the Southern Division of the District of Idaho, paid to the Oregon Short Line Railroad Company, at Boise, Idaho, the sum of Two Dollars and eighty-eight cents, (\$2.88), for the purchase of a railroad ticket on the line of said company, from Weiser, Idaho, to Boise, Idaho, to be used by the said Nora E. Bishop, alias Ellen Stone; and at the said time and place, directed the agent of said Railroad Company to telegraph such ticket to Weiser, Idaho, care Oregon Short Line train, number twenty-four (24);

And pursuant further to the aforesaid conspiracy, combination, confederation and agreement, and to effect the object and purpose thereof, he, the said John R. Corbett, also known as J. R. Corbett, on the 20th day of January, A. D. 1923, at Boise, in the County of Ada and State of Idaho, and within the Southern Division of the District of Idaho, met the said Nora E. Bishop, alias Ellen Stone, at the Oregon Short Line passenger station in Boise, Idaho, and accompanied her to the Capital Hotel in Boise, Idaho, and to room thirty-six (36) in said hotel;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

E. G. DAVIS,
*United States Attorney for the
District of Idaho.*

L. L. BRECKENRIDGE,
*Foreman of the United States
Grand Jury.*

WITNESSES EXAMINED BEFORE THE
GRAND JURY IN THE ABOVE CASE.

R. B. McCUTCHEN,
GEORGE A. DAY,
LILLIAN STANDISH,
MRS. MABEL KEITH,
ALLEN W. BISHOP,
L. C. FLORA,
ROBERT C. COLE,
MAE SACK,
MRS. B. L. LANE.

“INDICTMENT

Charge: Violation 37 Penal Code, Conspiracy to
Commit Offenses against the United States.

E. G. DAVIS,
U. S. Attorney.

A true bill.

L. L. BRECKENRIDGE,
Foreman.

Presented by the foreman in open court and filed
in the presence of the grand jury this 10th day of
Sept., 1923.

W. D. McREYNOLDS,
Clerk.”

Endorsed, Filed Sept. 10, 1923.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MINUTE ENTRIES.

February 15, 1923.

No. 954.

Comes now the District Attorney with the defendant and his counsel, William Langroise, Esq., into Court, the defendant to be arraigned upon the indictment. The reading of the indictment was waived by the defendant who was informed of the contents thereof by the Court. Ten o'clock a. m. on February 16, 1923, was fixed as the time for the defendant to plead.

February 16, 1923.

Comes now the District Attorney with the defendant and his counsel into Court, this being the time fixed for the defendant to plead. The Court asked him whether he pleads guilty or not guilty of the offense charged in the indictment, and he plead not guilty. Whereupon, the cause was set for trial on February 21, 1923.

September 15, 1923.

No. 995

Comes now the District Attorney with the defendants and their counsel, S. L. Tipton, Esq., and J. T. Cook, Esq., the defendants to be arraigned upon the indictment. The reading of the indictment was waived by the defendants, who were informed of the contents thereof by the Court. The Court asked each defendant if he had been indicted by his true name and each replied in the affirmative.

The Court then asked the defendants if they pleaded guilty or not guilty of the offense charged in the indictment and each defendant plead not guilty. * * *

(Title of Court and Cause.)

VERDICTS

No. 954.

We, the jury in the above entitled cause find the defendant Guilty on the first count and Guilty on the second count as charged in the indictment.

J. L. BAXTER,
Foreman.

Endorsed, Filed Sept. 17, 1923.
W. D. McREYNOLDS, Clerk.

Judgment

No. 995.

We, the jury in the above entitled cause find the defendants Guilty as charged in the indictment.

J. L. BAXTER,
Foreman.

Endorsed, Filed Sept. 17, 1923.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

Judgment

No. 954.

Now, on this 24th day of September, 1923, the

United States District Attorney, with the defendant John R. Corbett and his counsel, S. L. Tipton and J. T. Cook, came into Court; the defendant was duly informed by the Court of the nature of the indictment found against him for the crime of Violation of Act of June 25, 1910, committed on the 20th day of January, A. D. 1923; of his arraignment and plea of not guilty; of the trial, and verdict of the jury on the 17th day of September, A. D. 1923, "Guilty as charged in the indictment." The defendant was then asked by the Court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant having been convicted of the crime of Violation of Act of June 25, 1910,

It is hereby considered and adjudged that the said defendant, John R. Corbett do pay a fine of One Thousand Dollars, and that he be imprisoned and kept in the Ada County jail for the term of Ten Months. Defendant's bond on appeal was fixed at \$2500.00, and he was permitted to go upon his present bond until Thursday, September 27, 1923.

(Title of Court and Cause.)

Judgment

No. 995.

Now, on this 24th day of September, 1923, the United States District Attorney, with the defendant, Nora E. Bishop and her counsel, S. L. Tipton and J. T. Cook, came into Court; the defendant was duly informed by the Court of the nature of the indictment found against her for the crime of Violation Section 37, Penal Code, Conspiracy to Commit an Offense Against the United States, committed on the 11th day of January, A. D., 1923; of her arraignment and plea of not guilty, of the trial, and the verdict of the jury on the 17th day of September, A. D., 1923, "Guilty as charged in the indictment." The defendant was then asked by the Court if she had any legal cause to show why judgment should not be pronounced against her, to which she replied that she had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant having been convicted of the crime of Violation Section 37 Penal Code, Conspiracy to Commit an Offense Against the United States,

It is hereby considered and adjudged that the said defendant, Nora E. Bishop be imprisoned and kept in the Twin Falls County jail for the term of Three Months, and it is further ordered and adjudged that the defendant be and is hereby remanded to the custody of the United States Marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

(Title of Court and Cause.)

Judgment

No. 995.

Now, on this 24th day of September, 1923, the United States District Attorney, with the defendant, John R. Corbett, and his counsel, S. L. Tipton and J. T. Cook, came into Court; the defendant was duly informed by the Court of the nature of the indictment found against him for the crime of Violation Section 37, Penal Code, Conspiracy to Commit an Offense Against the United States, committed on the 11th day of January A. D., 1923, of his arraignment and plea of not guilty, of the trial, and the verdict of the jury on the 17th day of September A. D. 1923, "Guilty as charged in the indictment." The defendant was then asked by the Court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant having been convicted of the crime of Violation Section 37, Penal Code, Conspiracy to Commit an Offense Against the United States.

It is hereby considered and adjudged that the said defendant, John R. Corbett, be imprisoned and kept in the Ada County jail for a term of Ten months, said term to run concurrently with judgment in cause No. 954.

And it is further ordered and adjudged that said defendant be and is hereby remanded to the custody of the United States Marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

(Title of Court and Cause.)

MOTION FOR A NEW TRIAL.

Now comes the defendants in the above entitled cause and moves the Court to set aside the verdict of the jury herein and grant a new trial of said cause for the following reasons:

1. Insufficiency of the evidence to justify the verdict in this: There is no evidence of any intent to transport in interstate commerce said Nora E. Bishop, or to induce, entice and persuade the said Nora E. Bishop to give herself up to debauchery and to other immoral practices. There is no evidence to prove or tending to prove that Nora E. Bishop was transported in interstate commerce from one state to another, for the purpose of giving herself up to debauchery and other immoral practices. Evidence fails to show that there was any transportation in the interstate commerce, as prohibited by the White Slave Traffic Act. The evidence shows that Nora E. Bishop was transported in interstate commerce from Boise, Idaho, to Spokane, Washington, and return for legitimate

purposes. There is no evidence of a conspiracy with the intent and purpose that Nora E. Bishop be transported in interstate commerce for the purpose set out in the indictment.

2. Errors in law occurring at the trial, to-wit:

The Court, in the presence of the jury, and over the objection of counsel for the defendant, permitted Government counsel on cross-examination of the witness, Nora E. Bishop, to ask her questions for the purpose of impeachment by incompetent, contradictory statements that she made in an involuntary confession.

3. Error in law occurring at the trial, to-wit:

The Court committed error in the refusal to give to the jury each and every of the instructions requested by and on behalf of the defendant and refused by the Court, being instructions Nos. 1, 3 and 4, to which action of the Court in refusing to give said instructions and in the refusal to give each of them, defendants duly excepted at the time.

J. T. COOK,

S. L. TIPTON,

Attorneys for Defendants.

Service of the above and foregoing motion for a new trial and receipt of copy thereof, duly acknowledged this twenty-first day of November, 1923.

E. G. DAVIS,

Attorney for United States.

Endorsed, Filed Sept. 21, 1923.

W. D. McREYNOLDS, Clerk.

MINUTE ENTRY.

ORDER DENYING MOTION FOR NEW TRIAL

September 24, 1923.

Ordered that the defendants' motion for a new trial be, and the same hereby is, denied.

(Title of Court and Cause.)

ORDER FOR EXTENSION OF TIME FOR PREPARING BILL OF EXCEPTIONS.

It is hereby ordered that the time heretofore granted the defendant in the above entitled cause for preparing and lodging his bill of exceptions, and for procuring a writ of error in the above entitled cause be, and the same is hereby extended to and including the first day of October, 1923.

FRANK S. DIETRICH,

District Judge.

Dated September 26, 1923.

Time extended to October 5, 1923.

FRANK S. DIETRICH,

October 1, 1923.

Extended to and including October 6, 1923.

DIETRICH, *Judge.*

Endorsed, Filed Sept. 26, 1923,
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

Nos. 954-995.

CONSOLIDATED CASES FOR TRIAL AND THE
SAID CASES WERE TRIED IN SAID COURT
TOGETHER SO CONSOLIDATED, AS ONE
CASE.

BILL OF EXCEPTIONS.

Be It Remembered, that on the trial of this cause in the above entitled Court at the September, 1923 term of said Court, the Honorable F. S. Dietrich presided. The following proceedings were had, to-wit:

The jury, having been first empanelled and sworn according to law, the testimony was offered on the part of the plaintiff and the defendants. That no Court reporter was present to take down and report the testimony and proceedings given on the said consolidated trial, and that in lieu of the same counsel for the government and for the defendants stipulated that the following are the essential facts testified to by the witness called at the transcript of record, proceedings and papers upon which said appeal is based and transmitted to said United States Circuit Court of Appeals for its consideration in connection with the said appeal and

consolidated trials.

Nora Bishop, alias Ellen Stone, was tried in the Federal Court at Boise, Idaho, on October 3rd, 1922, on a charge of embezzling post office funds and was acquitted by the jury. She was at that time and is now a married woman, having a family of four children ranging from three to seventeen years of age.

The defendant, Corbett, first met the defendant, Bishop, some time prior to the said trial. While in jail in Boise awaiting trial she sent for Corbett and he thereafter interested himself in her defense. On the night of her acquittal by the jury the defendant, Corbett, took her to the Capital Hotel in Boise, Idaho, where she was first assigned to room 39. This assignment was later changed, at Corbett's request, to room 33. Room 33 was just across a narrow hall from room 32, which was then and which for some time prior thereto had been occupied by Corbett. Defendants Corbett and Bishop continued to occupy rooms 32 and 33 respectively until about the first day of November, 1922, when at the request of the defendants they were transferred to rooms 27 and 65. There were adjoining rooms with a communicating door between. A short time later they again requested a change of rooms, this time from rooms 27 and 65 to rooms 36 and 37. These two rooms last indicated constituted what was known in the Capital Hotel as

housekeeping suite, room 36 being a bed room and room 37 being the kitchen. Corbett requested the landlady to place a cot in the kitchen of this housekeeping suite for his use. The door between rooms 37 and 36 could be locked from either side. On the side of room 37 there was an old fashioned lock with a key and also a bolt. On the side of the door in room 36, occupied by Mrs. Bishop, there was a latch which could be slipped into place. The landlady testified that she took no account of whether the door was locked or unlocked but she also testified that she had never seen the door open. She also testified that the occupants of these rooms could open the communicating door by unlocking it on their respective sides. The defendants continued to occupy these rooms 36 and 37 until on or about the eighteenth day of December, 1922, when defendant Bishop received the following telegram:

Spokane, Washington, December 18, 1922.

Ellen Stone,

Capital Hotel,

Boise, Idaho.

Ted and I are going to be operated on on the twenty-first of December. Come before it is too late.

(Signed) Daughter.

Following the receipt of this telegram, defendant Bishop went to Spokane, where she rejoined her

family and assisted in the care of her two children, who had been operated upon, as indicated in the telegram. She remained with them until on or about the nineteenth day of January, 1923. Defendant Corbett loaned her the money on which to go to Spokane and while she was there he testified that he sent her fifteen dollars additional. Mrs. Bishop testified that she did not cohabit with her husband during the month that she was in Spokane. On January tenth, Mrs. Bishop sent the defendant, Corbett, the following telegram:

Spokane, Washington, January 10, 1923.

J. R. Corbett,
Capital Hotel,
Boise, Idaho.

Received your letter yesterday. There was a mistake. Was glad to hear from you and please do not be worried when you receive my letter.

(Signed) Ellen Stone.

The defendant, Corbett, wired Ellen Stone as follows:

Boise, Idaho, January 11, 1923.

Ellen Stone,
3809 Liberty St.,
Spokane, Washington.

Sending money to come home on. Wire when you start.

(Signed) J. R. Corbett.

On the thirteenth day of January, 1923, Ellen Stone telegraphed the defendant, Corbett, as follows:

Spokane, Washington, January 13, 1923.

J. R. Corbett,
Capital Hotel,
Boise, Idaho.

Have been very poorly for past week. Will start as soon as I am able. Wire me if you think it best for me to bring Paul. Just say yes or no.

(Signed) Ellen Stone,

In response to this telegram, Corbett wired her as follows:

Ellen Stone,
3809 Liberty St.,
Spokane, Washington.

Do not think so at this time. Come as soon as you can.

(Signed) J. R. Corbett.

In reply to this telegram Ellen Stone wired as follows:

Spokane, Washington, January 14, 1923.

J. R. Corbett,
Capital Hotel,
Boise, Idaho.

Will come at once.

(Signed) Ellen Stone,

With the money sent by Corbett on January 11th, Ellen Stone purchased a ticket over the Oregon-Washington Railway & Navigation Company and the Oregon Short Line Railway Company from Spokane, Washington, to Weiser, Idaho. On the 19th of January, 1923, Corbett received the following telegram from Ellen Stone:

Umatilla, Oregon, January 19, 1923.

John Corbett,
Capital Hotel,
Boise, Idaho.

Wire me a ticket to Weiser, Idaho, or meet me there. Leaving Umatilla January twentieth, five A. M.

(Signed) Ellen Stone,

In compliance with this telegram defendant Corbett purchased from the agent of the O. S. L. Railway Company a ticket for her from Weiser to Boise, Idaho, and paid the O. S. L. Railway Company agent for the same \$2.88. On this ticket so purchased Ellen Stone was transported over the O. S. L. Railroad from Weiser to Boise, Idaho. The defendants testified that after their arrest on the charges on which they were tried the money advanced by the defendant Corbett to transport the defendant Bishop from Spokane, Washington, to Boise, Idaho, was repaid to Corbett by Mrs. Bishop's father.

Mrs. Bishop brought with her from her husband's home in Spokane their three-year-old child. She was met at the Oregon Short Line depot at Boise by defendant Corbett, who took her baggage and the two defendants went together to the Capital Hotel. She did not report to the desk or register but went direct to the room number 36, which she had occupied before going to Spokane. Corbett went with her and built a fire in her room. Shortly thereafter he made her a cup of coffee in his room 37 and she and the child had a light lunch in his room. The defendants both testified that after this lunch they returned to room 36, where they talked until about ten o'clock P. M., at which time Corbett retired to his own room. About midnight of this same night the defendants were arrested by a deputy from the U. S. Marshal's office on a charge of violating the White Slave Traffic Act. The deputy marshal asked the landlady of the hotel in what room he would find Corbett and she said 36. He knocked at this door and after waiting two or three minutes Nora Bishop came to the door. He asked her where Corbett was and she replied that he was in room 37. The deputy marshal then knocked on the door of room 37 opening into the hall and after a short time Corbett came to that door and unlocked it but it would not open sufficiently to permit him to come out. It struck a commode after opening a distance, which the witness indicated with his

hands, apparently about a foot. Corbett later moved the commode and opened the door and came into the hall. After Mrs. Bishop had been given some time in which to put on some clothes the deputy marshal stepped into her room 37 and found the latch on her side unfastened. Later on and before taking the defendants to his office he testified that he found the door locked on Mrs. Bishop's side with the latch, and he further testified that Mrs. Bishop admitted to him that she had slipped the latch into place while his back was turned. After entrance was secured into Corbett's room it was found that the door was locked on his side. The landlady of the hotel testified that the commode above referred to ordinarily stood when these two rooms were used by independent parties in front of the communicating door between the two rooms and that if it was moved to the side next the door leading from room 37 into the hall so as to permit passage from room 37 to 36 the commode would then be in a position where it would prevent the opening of the door from room 37 into the hall. Both defendants testified that they were in love with each other and intended to be married after Mrs. Bishop secured a divorce. She testified that she had consulted an attorney with reference to securing such a divorce but that her suit therefore had not been filed up to the time of this trial. Mrs. Bishop testified that at the time she left Boise to

go to Spokane she intended to return and wrote a letter to her father to that effect. She also testified that she wrote from Spokane to her father telling him of her intended return to Boise. A chambermaid at the hotel also testified that she heard Mrs. Bishop say that she would return. She also arranged to have her things left in her room during her absence and they were so left in the room. From the time that Mrs. Bishop first went to the Capital Hotel up to the time of the arrest of the defendants, the defendant, Corbett, had paid the room rent for each of the rooms occupied by Mrs. Bishop under the circumstances herein above set out. Mrs. Bishop testified that she had repaid \$40.00 of this sum to Corbett after the arrest.

During the time that Mrs. Bishop was in the Capital Hotel before going to Spokane, or at least during the greater part of this time, she was employed as a waitress in the Uneeda Restaurant and had made arrangements before leaving that her position should be retained for her. Mrs. Bishop was arrested and released on bond but she did not go to work for the Uneeda Restaurant in accordance with the previous arrangement testified to. Instead, she went to work, when she did go to work, for another restaurant known as the Silver Grill. Mrs. Bishop testified that while working at the Uneeda Restaurant she took her meals there.

There was no direct testimony showing any im-

moral act at the Capital Hotel by the defendants, Corbett and Bishop, and the landlady of the hotel and one of the chambermaids testified that so far as they had observed their acts were proper.

After hearing all the evidence in the consolidated trials, after argument of counsel both of the government and the defendants and the charge of the Court the defendants duly accepted in the presence of the jury to the Court's refusal to give the following instructions requested by the defendants, which instructions are as follows:

1. "The jury are instructed if you are satisfied from the evidence, that the defendants were domiciled and living at Boise, Idaho, and that Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, State of Washington and return to Boise, Idaho, and at the time of leaving Boise, Idaho, she left her position of employment both defendants fully intended that she would return to her employment at Boise, Idaho, after having visited her children at Spokane, Washington.

"And if you find from the evidence that the defendant, Corbett, at the time of her leaving Boise, Idaho, arranged with her to furnish her the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington and return to Boise, Idaho, and even if you should further find from the evidence that the defendants prior to and at the time of her going to Spokane and returning to Boise had illicit intercourse, you should acquit them."

4. "The jury are instructed if you are satisfied from the evidence that the defendants were

domiciled and living at Boise, Idaho, Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, Washington, from Boise, Idaho, and returned from Spokane, Washington, to Boise, Idaho, and at the time of leaving Boise, Idaho, for Spokane, Washington, she left her position of employment, both of the defendants fully intended at the time she left Boise, Idaho, that she would return from Spokane, Washington, to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you find from the evidence, that the defendant Corbett at the time of her leaving Boise, Idaho, for her said trip to Spokane, Washington, and return, arranged with her to furnish the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington, and return to Boise, Idaho, had illicit intercourse and you further find from the evidence that he had in mind at the time of furnishing transportation, he would continue the prior illicit intercourse with her, you should acquit them."

It is hereby understood and agreed by Court and counsel that no instructions were given by the Court in said consolidated trials, the same or substantially the same or any modification of the same; as the instructions herein requested by the defendants and refused by the Court.

The jury retired to consider their verdict and returned the verdict, finding the defendant, John R. Corbett, guilty on both counts, as charged in the indictment No. 954, and both the defendants, John R. Corbett and Nora E. Bishop guilty, as charged

in indictment No. 995, to which verdict the defendants then and there duly accepted.

Thereupon, within the time allowed by the Court and on the twenty-second day of October, 1923, defendants filed a motion for a new trial, which motion is as follows:

(Title of Court and Cause.)

MOTION FOR A NEW TRIAL.

Now comes the defendants in the above entitled cause and moves the Court to set aside the verdict of the jury herein and grant a new trial of said cause for the following reasons:

1. Insufficiency of the evidence to justify the verdict in this:

There is no evidence of any intent to transport in interstate commerce said Nora E. Bishop or to induce, entice and persuade the said Nora E. Bishop to give herself up to debauchery and to other immoral practices. There is no evidence to prove or tending to prove that Nora E. Bishop was transported in interstate commerce from one state to another, for the purpose of giving herself up to debauchery and other immoral practices. Evidence fails to show that there was any transportation in interstate commerce, as prohibited by the White Slave Traffic Act. The evidence shows that Nora E. Bishop was transported in interstate commerce from Boise, Idaho, to Spokane, Washington, and return for legitimate purposes. There is no evidence of a conspiracy with the intent and purpose that Nora E. Bishop be transported in interstate commerce for the purposes set out in the indictment.

2. Error in law occurring at the trial, to-wit:

The Court, in the presence of the jury and over the objection of counsel for the defendant permitted Government counsel on cross-examination of the witness, Nora E. Bishop, to ask her questions for the purpose of impeachment by incompetent, contradictory statements that she made in an involuntary confession.

3. Error in law occurring at the trial, to-wit:

The Court committed error in the refusal to give to the jury each and every of the instructions requested by and on behalf of the defendants and refused by the Court, being instructions Nos. 1, 3 and 4, to which action of the Court in refusing to give said instructions and in the refusal to give each of them defendants duly excepted at the time.

(Signed) J. T. COOK,
S. L. TIPTON,
Attorneys for Defendants.

Service of the above and foregoing motion for a new trial and receipt of copy thereof, duly acknowledged this twenty-second day of September, 1923.

(Signed) E. G. DAVIS,
Attorney for United States.

The Court, after hearing the argument upon the said motion by counsel for both sides, took the same under advisement and on the twenty-fourth day of October, 1923, the Court overruled said motion for a new trial, to which ruling of the Court the defendants then and there duly accepted.

And now in furtherance of justice and that right may be done, the said defendants present the foregoing as their Bill of Exceptions to the action of the

Court in the various particulars therein set out, and prays that the same may be settled and allowed, and signed, sealed and verified by the judge and made a part of the record in said case.

J. T. COOK,

S. L. TIPTON,

Attorneys for Defendants,
Residence, Boise, Idaho.

Duly settled and allowed as the defendants' Bill of Exceptions this 6th day of October, 1923.

FRANK S. DIETRICH,

Judge.

Endorsed, Filed Oct. 6, 1923.

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause.)

CONSOLIDATED CASES.

Numbers 954-995.

PETITION FOR WRIT OF ERROR.

Comes now the defendants, John R. Corbett, also known as J. R. Corbett and Nora E. Bishop, also known as Ellen Stone, and complain and say that on or about the 24th day of September, 1923, this Court entered judgments and sentences herein against these defendants severally in which judgment in the proceedings had prior thereto certain errors were committed to the prejudice of these de-

fendants and each of them. All of which appears on the assignment of errors, which is filed with this petition.

WHEREFORE, These defendants and each of them pray that a writ of error be issued in their behalf out of this Court or out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of and that a transcript of record proceedings and papers in this cause duly authenticated may be sent to the Circuit Court of Appeals of the Ninth Circuit.

J. T. COOK,

S. L. TIPTON,

Attorneys for Defendants.

Service acknowledged this 6th day of October, 1923.

E. G. DAVIS,

United States Attorney.

Endorsed, Filed Oct. 6, 1923.

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause.)

CONSOLIDATED CASES.

Numbers 954-995.

ASSIGNMENT OF ERROR.

Now come the defendants, John R. Corbett, also known as J. R. Corbett and Nora E. Bishop, alias

Ellen Stone and severally in connection with the petition for writ of error herein make the following assignments of error, which are alleged to have occurred in the proceedings had in the above entitled cause, to-wit:

1.

The Court erred in refusing to give the following instruction requested by the defendants:

“The jury are instructed, if you find from the evidence that the defendants were domiciled and living at Boise, Idaho, and that Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, State of Washington, and returned to Boise, Idaho, and at the time of leaving Boise, Idaho, she left her position of employment both defendants fully intended that she would return to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you further find from the evidence that the defendant, Corbett, at the time of her leaving Boise, Idaho, arranged with her to furnish her the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington and return to Boise, Idaho, and if you should further find from the evidence that the defendants prior to and at the time of her going to Spokane and returning to Boise had illicit intercourse, you should acquit them.”

For the reasons the evidence shows the defendants were domiciled in Boise at the beginning of the interstate transportation that Nora E. Bishop was

there employed, was domiciled there for the purpose of securing a divorce from her husband, that the trip was a continuous trip from Boise, Idaho, to Spokane, Washington, and return; that the transportation in interstate commerce both to and from Spokane and Boise was for a proper and legitimate purpose, that the intent at all the times on the part of the defendants was for her to return to her employment and her domicile at Boise, Idaho.

II.

The Court erred in refusing to give the following instruction, as requested by the defendants:

“The jury are instructed that if you are satisfied from the evidence that the defendants were domiciled and living at Boise, Idaho, and while so domiciled and living, Nora E. Bishop, alias Ellen Stone,, was transported in interstate commerce to Spokane, Washington, from Boise, Idaho, and returned from Spokane, Washington, to Boise, Idaho, and at the time of leaving Boise, Idaho, for Spokane, Washington, she left her position of employment, both of the defendants fully intending at the time she left Boise, Idaho, that she would return from Spokane, Washington, to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you find from the evidence that the defendant, J. R. Corbett, at the time of her leaving Boise, Idaho, for her said trip to Spokane, Washington, and return, arranged with her to furnish the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington and return to Boise,

Idaho, and even if you should further find from the evidence that the defendants prior to and at the time of her going from Boise, Idaho, to Spokane, Washington, and returning to Boise, Idaho, had illicit intercourse, and if you further find from the evidence that he had in mind at the time of furnishing transportation that he would continue the prior illicit intercourse with her, you should acquit them." For the reasons set out in assignment No. 1.

III.

The verdict of the jury is contrary to the evidence, as follows:

(a) There is no proof that the transportation in interstate commerce was with the intent and purpose that Nora E. Bishop give herself up to debauchery and other immoral practices.

(b) There is no direct proof as to any illicit intercourse between the defendants at any time.

(c) There is no proof that Nora E. Bishop was transported from one state to another.

(d) There is no direct proof as to Nora E. Bishop being transported in interstate commerce with the intent and purpose that she give herself up to debauchery and other immoral practices.

(e) There is no proof that there was at any time illicit sexual intercourse between the defendants.

(f) There is no proof as to any illicit intercourse except circumstantial evidence of their association together in the Capitol Hotel prior to her

transportation in interstate commerce from Spokane, Washington, to Boise, Idaho, or upon her return to Boise, Idaho.

(g) There is no proof that any offense was committed, as prohibited or denounced by the White Slave Traffic Act, or any Law of United States.

(h) There is no proof that the transportation in interstate commerce was with any other intent or purpose than a legitimate purpose.

(i) There is no evidence of a conspiracy showing any intent on the part of either of the defendants, as charged in indictment No. 995.

(j) There is no proof that the transportation in interstate commerce was with the intent and purpose on the part of John R. Corbett to induce, entice and compel Nora E. Bishop, alias Ellen Stone, to engage in immoral practices, as set out in the first count of the indictment, No. 954.

(k) There is no proof that the defendant, John R. Corbett, induced, enticed or persuaded Nora E. Bishop, alias Ellen Stone, to be transported with the intent and purpose that she engage in immoral practices with him as alleged in count two of the indictment, No. 954.

(l) There is no proof that the defendant, John R. Corbett, aided, assisted or caused Nora E. Bishop, alias Ellen Stone, to be carried and transported from Spokane, Washington, to Boise, Idaho, as alleged in count two of the indictment, No. 954.

IV.

The Court erred in denying defendants' motion for a new trial, for the reasons set out in assignment "a to l" inclusive, of No. 3 and assignments Nos. 1 and 2 herein.

V.

The verdict herein is contrary to the law, for the reasons set out in assignment No. 3.

VI.

The verdict herein is contrary to the law for the reason that the indictment does not state a conspiracy, as there is no joint intent alleged therein.

The judgments herein are unlawful, for the reasons that they are based upon verdicts unlawful and unsupported by the evidence, in the particulars set out in specification No. 3, herein stated.

WHEREFORE, The plaintiff in error prays that the judgment herein be reversed.

J. T. COOK,

S. L. TIPTON,

*Attorneys for Defendants and
Plaintiffs in Error.*

Service acknowledged this sixth day of October,
1923.

E. G. DAVIS,

United States Attorney.

Endorsed, Filed Oct. 6, 1923,

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause.)

CONSOLIDATED CASES.

Nos. 954-995.

ORDER GRANTING WRIT OF ERROR,
CRIMINAL.

On petition of the defendants above named, it is hereby ordered that a writ of error directed to the judgments heretofore rendered and entered herein be and the same is hereby granted and allowed, and that a certified transcript of the record, testimony, necessary exhibits and all proceedings be forthwith transmitted to the clerk of the Circuit Court of Appeals of the United States for the Ninth Circuit.

It is further ordered that the defendants be and they are hereby admitted bail respectively in the following sums pending the termination of said proceedings in error, conditional according to law, to-wit: John R. Corbett, alias J. R. Corbett, in the sum of Twenty-Five Hundred Dollars (\$2500.00), and Nora E. Bishop, alias Ellen Stone, in the sum of Five Hundred Dollars, (\$500.00).

Dated this 6th day of October, 1923.

FRANK S. DIETRICH,
*United States District Judge,
for the District of Idaho.*

Endorsed, Filed Oct. 6, 1923.

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause.)

CONSOLIDATED CASES.

Nos. 954-995.

BOND.

Approved:

DIETRICH, *Judge.*

October 12, 1923.

WHEREAS, on the 24th day of September, 1923, judgments of conviction were rendered against J. R. Corbett, the above named defendant and against John R. Corbett, also known as J. R. Corbett, and Nora E. Bishop, alias Ellen Stone, defendants in the above entitled Court and causes and whereas the said defendant, John R. Corbett, also known as J. R. Corbett, has procured a writ of error in the said cause, directed to said Court for the purpose of securing said judgment, and the proceedings leading thereto, to be reviewed in the Circuit Court of Appeals for the Ninth Circuit of the United States of America.

And whereas, the defendant John R. Corbett has been admitted to bail, and his said bail fixed at \$2500.00 on the said two judgments of conviction pending the hearing and decision of the Circuit Court of Appeals in said writ of error.

Now, therefore, the undersigned, John R. Corbett, principal, and Miguel Gabica and J. Leroy Davies and John Skillern and C. L. Weeks sureties, do hereby acknowledge themselves well and truly bound unto the United States of America in the

penal sum of Twelve Hundred Fifty Dollars each.

The condition of this recognizance is such, that if the said John R. Corbett shall diligently prosecute the proceedings herein pursuant to said writ of error, and if in the event said judgments of conviction is affirmed and made final, he shall appear in the above entitled Court and deliver and render himself for execution of said judgment at such time and place as may by said Court be ordered and directed. Then these presents shall be void; otherwise they shall be in full force and effect.

JOHN R. CORBETT,

Principal.

JOHN SKILLERN,

Surety.

J. LEROY DAVIES,

Surety.

MIGUEL GABICA,

Surety.

C. L. WEEKS,

Surety.

State of Idaho,)
) ss.
 County of Ada,)

John Skillern, being first duly sworn, deposes and says that he is one of the sureties in the foregoing recognizance and that he is worth the sum of Twelve Hundred Fifty Dollars, over and above his just debts and exemptions and that his property consists of Real and Personal property.

And J. Leroy Davies, in the foregoing recogniz-

ance, being first duly sworn, deposes and says that he is worth the sum of Twelve Hundred Fifty Dollars over and above his just debts and exemptions and that his property consists of Real and Personal property.

And Miguel Gabica, in the foregoing recognizance, being first duly sworn, deposes and says that he is worth the sum of Twelve Hundred Fifty Dollars over and above his just debts and exemptions and that his property consists of Real and Personal property.

And C. L. Weeks, in the foregoing recognizance, being first duly sworn, deposes and says that he is worth the sum of Twelve Hundred Fifty Dollars over and above his just debts and exemptions and that his property consists of Real and Personal property.

JOHN SKILLERN,
J. LEROY DAVIES,
MIGUEL GABICA,
C. L. WEEKKS,

Subscribed and sworn to before me this 10th day of October, 1923.

J. R. GOOD,
Notary Public for Idaho.
Residence, Boise, Idaho.

(SEAL)

Endorsed, Filed Oct. 12, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CONSOLIDATED CASES.

Nos. 954-995.

PRAECIPE.

To the Clerk of the Above Named Court:

Please include in the record for the Circuit Court of Appeals for the Ninth Circuit in the proceedings in error in the above entitled cause, the following, to-wit:

The Indictments. Nos. 995 and 954.

Arraignment and Pleas of defendants.

Verdict and Minute Entry allowing exceptions thereto, judgments of Court on verdict.

Motion for a New Trial.

Decision of Court on hearing of motion for a new trial,

Bill of Exception and acknowledgment of service indorsed thereon.

Order settling Bill of Exceptions.

Minute entry of order for time to lodge Bill of Exceptions, and

Petition for Writ of Error.

Order filed extending time to lodge Bill of Exceptions to October 6th, 1923.

Petition for Writ of Error.

Assignments of Error.

Order Allowing Writ of Error.

Writ of Error.

Citation.

Bonds of Plaintiffs in Error, on Appeal.

This Praecipe.

Clerk's return to Writ of Error

Clerk's Certificate.

J. T. COOK,

S. L. TIPTON.

Attorneys for Defendants.

Endorsed, Filed Oct. 12, 1923.

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause.)

CONSOLIDATED CASES.

Nos. 954-995.

WRIT OF ERROR.

United States of America,)
Ninth Judicial District,) ss.

The President of the United States to the Honorable Judge of the District Court of the United States for the District of Idaho, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of the pleas which is in the said District Court, before you, between the United States of America and John R. Corbett, also known as J. R. Corbett and Nora E. Bishop, alias Ellen Stone, defendants, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if

judgment be therein given, that then under your seal, distinctly and openly, you sent the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in said Circuit on the 6th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 6th day of October, A. D. 1923, in the one hundred forty-eighth year of the independence of the United States of America.

Allowed by Honorable Frank S. Dietrich, United States District Judge.

ATTEST:

FRANK S. DIETRICH,

Service acknowledged and a copy received this 6th day of October, 1923.

E. G. DAVIS,

United States Attorney.

Endorsed, Filed Oct. 6, 1923,

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause.)

CONSOLIDATED CASES FOR TRIAL AND THE
SAID CASES WERE TRIED IN SAID COURT TO-
GETHER SO CONSOLIDATED, AS ONE CASE.

Nos. 995 and 954.

CITATION.

*The President of the United States to the Above
Named Plaintiff and to the United States Attor-
ney for the District of Idaho:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco in the State of California within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the United States District Court of the District of Idaho, Southern Division, in the above entitled cause, to show cause, if any there be, that the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 6th day of October, 1923, and the independence of the United States of America, the 146th.

FRANK S. DIETRICH,

Judge.

Service of the within Citation is hereby acknowledged the 6th day of October, 1923.

E. G. DAVIS,
*U. S. Attorney for the
District of Idaho. . .*

Endorsed, Filed Oct. 6, 1923,

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

WRIT TO RETURN OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

(SEAL)

Clerk.

(Title of Court and Cause.)

CONSOLIDATED CASES.

Nos. 954-995.

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 54, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled consolidated causes, and that the same together constitute the transcript of the record herein, upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as

requested by the praecipe filed herein.

I further certify that the cost of the record here-amounts to the sum of \$64.00, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court this 26th day of November, 1923.

W. D. McREYNOLDS,

(SEAL)

Clerk.

By M. Franklin, Deputy.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN R. CORBETT, also known as J. R.
CORBETT, and NORA E. BISHOP,
alias ELLEN STONE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

*Upon Writ of Error from the United States District
Court, for the District of Idaho,
Southern Division.*

Filed....., 192.....

By.....

CAPITAL NEWS PUBLISHING CO., BOISE

J. T. Cook.

S. L. Tipton.

ATTORNEYS FOR PLAINTIFFS IN ERROR.

No.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN R. CORBETT, also known as J. R.
CORBETT, and NORA E. BISHOP,
alias ELLEN STONE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

*Upon Writ of Error from the United States District
Court, for the District of Idaho,
Southern Division.*

Filed....., 192.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN R. CORBETT, also known as J. R.
CORBETT, and NORA E. BISHOP,
alias ELLEN STONE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

*Upon Writ of Error from the United States District
Court, for the District of Idaho,
Southern Division.*

STATEMENT OF THE CASE.

Plaintiffs in error were indicted in the District Court of the United States for the District of Idaho, upon two indictments, Nos. 954 and 995.

Upon indictment No. 954, John R. Corbett was charged with the violation Act of June 25, 1910,

White Slave Traffic Act, containing two counts.

I.

The first count charged:

That on or about the 20th day of January, 1923, John R. Corbett did knowingly, wilfully, unlawfully and feloniously transport and cause to be transported and did aid and assist in the transportation of Nora E. Bishop, alias Ellen Stone, in interstate commerce from Spokane, State of Washington, to Boise, State of Idaho, with the intent and purpose on his part to induce, entice and compel her to engage in immoral practices, to-wit, the practice of illicit sexual intercourse with him.

II.

The second count of said indictment charged:

That John R. Corbett did persuade, induce and entice Nora E. Bishop, alias Ellen Stone, to go and be carried in interstate commerce from Spokane, Washington, to Boise, Idaho, to engage in immoral practices with him, to-wit: illicit sexual intercourse with him. (Trans. pp. 7-8-9).

Indictment No. 995 charged the defendant with a conspiracy to commit an offense against the United States by conspiring and agreeing together, that the defendant, Nora E. Bishop, alias Ellen Stone, should be transported in interstate commerce from Spokane, State of Washington, to Boise, State of Idaho, with the intent and purpose on the part of John R. Corbett to induce, entice and procure the

said Nora E. Bishop to give herself up to debauchery and other immoral practices. (Trans. pp. 11-12-13-14-15-16).

By agreement of counsel for both sides, the two cases were consolidated for trial, the result of the trial:

John R. Corbett was convicted on both counts of indictment No. 954 and both defendants were convicted on indictment No. 995. The facts as proved by the evidence on the trial of the consolidated cases were that the defendants, Corbett and Nora E. Bishop, became acquainted at and during the time Nora E. Bishop was being tried in the Federal Court at Boise, Idaho, upon the charge of embezzling postoffice funds. Upon her acquittal of said charge, defendant Corbett took her to the Capital Hotel at Boise, Idaho, secured her a room in close proximity to the room he there occupied, paid her room rent, and on divers occasions at his request, had her room changed to a room adjoining his with connecting door between. The connecting doors of the various rooms so occupied could be locked from each side. On or about November 1st, 1923, on Corbett's request their rooms were changed to Rooms No. 27 and 65 (Tr. p. 26), which were light housekeeping rooms, with a connecting door and could be locked from each side. A short time later their rooms were changed (Tr. pp 36, 37). This situation of defendant's continued from October, 1922, to December, 1922, (Tr. pp. 26, 27), during

all the times defendants were living at the hotel their conduct was proper. During this period Nora E. Bishop was in the employ of the Uneda Restaurant, W. 33, Boise, Idaho, taking her meals there. She had established her domicile at Boise and had consulted an attorney in regard to obtaining a divorce from her husband.

On the 18th day of December, 1922, the defendant, Nora E. Bishop, received the following telegram:

Spokane, Wash.,
December 18/22.

Ellen Stone,
Capital Hotel,
Boise, Idaho.

Tel and I are going to be operated on on the 21st of December. Come before it is too late.

(Signed)

Daughter.

Upon receipt of this telegram, defendant, Nora Bishop, arranged to go to Spokane. She had her employer keep her place open in the restaurant until her return and had her room, No. 36 in the Capital Hotel, kept for her during her absence. (Tr. p. 33). Her things were left in her room, No. 36. Corbett did not accompany her on said trip but remained in Boise, occupying room 37 in said hotel.

Before leaving, she stated she intended returning to Boise, and while at Spokane she wrote her father, telling him she intended returning to Boise. Defendant, Corbett, loaned her money on which to go to Spokane (Tr. p. 28), and sent her while at

Spokane \$15.00 (Tr. p. 28), and at her request, defendant purchased a ticket for defendant Bishop from Weiser, Idaho, to Boise, Idaho. (Tr. p. 30).

On defendant Bishop's arrival with her three-year-old child at Boise, defendant Corbett met her at the depot (Tr. p. 31), took her and child to her reserved room at the Capital Hotel. Corbett built a fire for her, made a cup of coffee in his room and had a light lunch. (Tr. p. 31). They talked until about 10 p. m. when Corbett returned to his room, No. 37. (Tr. p. 31). They were arrested about midnight. Each at the time of the arrest were in their respective rooms, with the connection door locked. (Tr. p. 30).

SPECIFICATIONS OF ERRORS.

I.

The Court erred in refusing to give the following instruction requested by the defendants:

"The jury are instructed, if you find from the evidence that the defendants were domiciled and living at Boise, Idaho, and that Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, State of Washington, and returned to Boise, Idaho, and at the time of leaving Boise, Idaho, she left her position of employment both defendants fully intended that she would return to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you further find from the evidence that the defendant, Corbett, at the time of her leaving

Boise, Idaho, arranged with her to furnish her the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington, and return to Boise, Idaho, and if you should further find from the evidence that the defendants prior to and at the time of her going to Spokane and returning to Boise had illicit intercourse, you should acquit them."

For the reasons the evidence shows the defendants were domiciled in Boise at the beginning of the interstate transportation that Nora E. Bishop was there employed, was domiciled there for the purpose of securing a divorce from her husband, that the trip was a continuous trip from Boise, Idaho, to Spokane, Washington, and return; that the transportation in interstate commerce both to and from Spokane and Boise was for a proper and legitimate purpose, that the intent at all the times on the part of the defendants was for her to return to her employment and her domicile at Boise, Idaho.

II.

The Court erred in refusing to give the following instruction, as requested by the defendants:

"The jury are instructed that if you are satisfied from the evidence that the defendants were domiciled and living at Boise, Idaho, and while so domiciled and living, Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, Washington, from Boise, Idaho, and returned from Spokane, Washington, to Boise, Idaho, and at the time

of leaving Boise, Idaho, for Spokane, Washington, she left her position of employment, both of the defendants fully intending at the time she left Boise, Idaho, that she would return from Spokane, Washington, to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you find from the evidence that the defendant, J. R. Corbett, at the time of her leaving Boise, Idaho, for her said trip to Spokane, Washington, and return, arranged with her to furnish the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington and return to Boise, Idaho, and even if you should further find from the evidence that the defendants prior to and at the time of her going from Boise, Idaho, to Spokane, Washington, and returning to Boise, Idaho, had illicit intercourse, and if you further find from the evidence that he had in mind at the time of furnishing transportation that he would continue the prior illicit intercourse with her, you should acquit them."

For the reasons set out in Assignment No. 1.

III.

The verdict of the jury is contrary to the evidence, as follows:

(a) There is no proof that the transportation in interstate commerce was with the intent and purpose that Nora E. Bishop give herself up to debauchery and other immoral practices.

(b) There is no direct proof as to any illicit intercourse between the defendants at any time.

(c) There is no proof that Nora E. Bishop was transported from one state to another.

(d) There is no direct proof as to Nora E. Bishop being transported in interstate commerce with the intent and purpose that she give herself up to debauchery and other immoral practices.

(e) There is no proof that there was at any time illicit sexual intercourse between the defendants.

(f) There is not proof as to any illicit intercourse except circumstantial evidence of their association together in the Capitol Hotel prior to her transportation in interstate commerce from Spokane, Washington, to Boise, Idaho, or upon her return to Boise, Idaho.

(g) There is no proof that any offense was committed as prohibited or denounced by the White Slave Traffic Act, or any law of the United States.

(h) There is no proof that the transportation in interstate commerce was with any other intent or purpose than a legitimate purpose.

(i) There is no evidence of a conspiracy showing any intent on the part of either of the defendants, as charged in indictment No. 995.

(j) There is no proof that the transportation in interstate commerce was with the intent and purpose on the part of John R. Corbett to induce, entice and compel Nora E. Bishop, alias Ellen Stone, to engage in immoral practices, as set out in the first count of the indictment, No. 954.

(k) There is no proof that the defendant, John R. Corbett, induced, enticed or persuaded Nora E.

Bishop, alias Ellen Stone, to be transported with the intent and purpose that she engage in immoral practices with him as alleged in count two of the indictment, No. 954.

(1) There is no proof that the defendant, John R. Corbett, aided, assisted or caused Nora E. Bishop, alias Ellen Stone, to be carried and transported from Spokane, Washington, to Boise, Idaho, as alleged in count two of the indictment, No. 954.

IV.

The Court erred in denying defendants' motion for a new trial, for the reasons set out in assignment "a to l" inclusive, of No. 3 and Assignments os. 1 and 2 herein.

V.

The verdict ~~is~~ herein is contrary to the law, for the reasons set out in Assignment No. 3.

VI.

The verdict herein is contrary to the law for the reason that the indictment does not state a conspiracy, as there is no joint intent alleged therein.

The judgments herein are unlawful, for the reasons that they are based upon verdicts unlawful and unsupported by the evidence, in the particulars set out in Specification No. 3, herein stated.

ARGUMENT.

The Court erred in refusing to give instructions requested by defendants set out in Assignment of Error No. 1, as follows, to-wit:

"The jury are instructed, if you find from the evidence that the defendants were domiciled and living at Boise, Idaho, and that Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, State of Washington, and returned to Boise, Idaho, and at the time of leaving Boise, Idaho, she left her position of employment both defendants fully intended that she would return to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you further find from the evidence that the defendant, Corbett, at the time of her leaving Boise, Idaho, arranged with her to furnish her the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington, and return to Boise, Idaho, and if you should further find from the evidence that the defendants prior to and at the time of her going to Spokane, and returning to Boise had illicit intercourse, you should acquit them."

For the reason that the evidence in this case shows that no law was violated by the defendants or either of them. The evidence proved that Nora Bishop had left her husband and had established her domicile at Boise, Idaho, from on or about the 3rd day of October, 1922 (Tr. p. 26), had consulted an attorney with a view of securing a divorce (Tr. p. 32), was residing at the Capital Hotel, employed in a restaurant, taking her meals there. (Tr. p. 33). During all this time she associated with the defendant, Corbett, and expected to marry him upon receiving her divorce. (Tr. p. 32). He aided her by paying her room rent and a part of the money was

returned by her to him. (Tr. p. 33). On the 18th day of December, 1922, she received the following telegram from her daughter: (Tr. p. 27).

Spokane, Wash., Dec. 18th, 1922.

Ellen Stone,
Capital Hotel,
Boise, Idaho.

Ted and I are going to be operated on on the twenty-first of December. Come before it is too late.

(Signed)

Daughter.

Upon the receipt of this telegram, Nora Bishop, alias Ellen Stone, made arrangements to go to Spokane, (Tr. p. 27), and attend her children during their illness and as soon as possible would return to Boise, Idaho. She retained her room in the Capital Hotel, leaving a part of her things there and had the landlady of the hotel keep her room for her until her return, which was done. She further made arrangements with the restaurant where she was employed to keep her place for her until her return. (Tr. p. 33). She lacked the funds to make this trip and in order to aid her to make the trip to Spokane and return, defendant, Corbett, agreed or arranged with her to send her the money for her return. It was fully understood at the time of her leaving that she would return to Boise. She wrote a letter to her father while she was in Spokane, in which she advised him that she would return to Boise. (Tr. pp. 32-33). In view of this state of facts, we earnestly contend that the trans-

portation, as charged in the indictment, was not for immoral purposes but for perfectly legitimate purposes and, therefore, is not a violation of the Statute.

“Taking into account everything disclosed which upon her going back to McMechen, and her reason for returning, it is impossible for us to discover, in the words or conduct of defendant, anything resembling that persuasion and inducement which the act seems clearly to contemplate, and which appears to us essential to constitute a violation of the provision in question. The only reasonable deduction from the proofs is that the girl went home simply and solely because she felt that under the circumstances she ought to go there. The fact that the message from her aunt was brought to her by the man who had seduced her, and with whom she had immoral relations during the previous two years, cannot be said to have at all caused her return, because it does not seem open to doubt that she would have gone home just the same if the information and request upon which she acted had come to her through another channel. In short, there was no perceptible relation of cause and effect between her return and the defendant’s misconduct with her, whether before or after that event.”

Welch vs. United States, 220 Fed. p. 764.

“There can be no doubt that the sole object of the trip from Shafter to St. Louis was to enable her to visit her sister, and to try to obtain employment in a store, as she had been employed some months before. There is nothing in the evidence to show any possible reason why he should have gone to the trouble

and expense of taking her to St. Louis merely in order that he might have illicit intercourse with her."

Sloan vs. United States, 287 Fed. 91.

"In order to constitute the offense charged, there must be substantial evidence that the intention to transport the woman for immoral purpose must have been formed by the parties before they reached the foreign state to which the woman is being transported. If it did not exist then but was formed after reaching the state in which the immorality is committed, it is clearly insufficient to warrant a conviction under the act."

Sloan vs. United States, 287 Fed. 91.

The return of the defendant, Nora Bishop, to Boise, Idaho, would have occurred regardless of any act of the defendant, Corbett, because she contemplated securing a divorce from her husband, had established her domicile at Boise, Idaho, and had employment there and it was her home and the only home she had.

Further, no acts of immorality, either prior to or after her return from Spokane was proved. The only evidence that immoral relations existed between them at any time was the inference that might be drawn from their association at the Capital Hotel and the interest which the defendant, Corbett, manifested in Nora Bishop; and if there were any immoral relations between them, which we deny, it existed long prior to her return to Boise.

As to the second assignment of error in the re-

portation, as charged in the indictment, was not for immoral purposes but for perfectly legitimate purposes and, therefore, is not a violation of the Statute.

“Taking into account everything disclosed which upon her going back to McMechen, and her reason for returning, it is impossible for us to discover, in the words or conduct of defendant, anything resembling that persuasion and inducement which the act seems clearly to contemplate, and which appears to us essential to constitute a violation of the provision in question. The only reasonable deduction from the proofs is that the girl went home simply and solely because she felt that under the circumstances she ought to go there. The fact that the message from her aunt was brought to her by the man who had seduced her, and with whom she had immoral relations during the previous two years, cannot be said to have at all caused her return, because it does not seem open to doubt that she would have gone home just the same if the information and request upon which she acted had come to her through another channel. In short, there was no perceptible relation of cause and effect between her return and the defendant’s misconduct with her, whether before or after that event.”

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As to the second assignment of error in the re-

fusal of the Court to give the following instruction:

"The jury are instructed that if you are satisfied from the evidence that the defendants were domiciled and living at Boise, Idaho, and while so domiciled and living, Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, Washington, from Boise, Idaho, and returned from Spokane, Washington, to Boise, Idaho, and at the time of leaving Boise, Idaho, for Spokane, Washington, she left her position of employment, both of the defendants fully intending at the time she left Boise, Idaho, that she would return from Spokane, Washington, to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you find from the evidence that the defendant, J. R. Corbett, at the time of her leaving Boise, Idaho, for her said trip to Spokane, Washington, and return, arranged with her to furnish the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington, and return to Boise, Idaho, and even if you should further find from the evidence that the defendants prior to and at the time of her going from Boise, Idaho, to Spokane, Washington, and returning to Boise, Idaho, had illicit intercourse, and if you further find from the evidence that he had in mind at the time of furnishing transportation that he would continue the prior illicit intercourse with her, you should acquit them."

For the reasons set out in Assignment No. 1.

We contend that this instruction should have

been given under the evidence as proved on the trial and that our contention is supported by the authorities.

“A man who produced the interstate transportation of a girl with whom he had intercourse whenever he sought it, had during the past three years for the purposes of procuring a place where she could remain until after her confinement, cannot be convicted under the White Slave Act, although he accompanied her and anticipated that he would have intercourse with her after she left the state, if such expectation played no part in inducing him to procure transportation.”

Van Pelt vs. United States, 240 Fed., 346.

“In our judgment it will not do to say upon the facts here considered and about which there is no dispute that the act in question is violated because it may have occurred to him or he may have had in mind the probability or expectation of possessing her again unless her return to that place were brought about or influenced by his persuasion to justify his conviction, we think it was necessary to show that except for his sexpress desire and inducement she would not have made the journey. It appears to us an undeniable proposition when this girl went back home for a legitimate and commendable reason because of information coming to her which was of itself ample cause and explanation of her return. The defendant can be held to have committed an offense of which he was found guilty merely because he might have had the secret desire or intention of using her for the gratification of his passion, although he had nothing whatever

to do with her going back, which was entirely suitable and proper.”

Welsch vs. United States, 220 Fed. 769.

“For knowingly causing the transportation from one state to another for an immoral purpose where the testimony of the girl was uncontradicted was that she insisted on going to a city in another state for reasons which she stated and that she paid for both tickets the evidence is insufficient to sustain conviction.”

Torn vs. United States, 278 Fed. 932.

We insist under the evidence that there was no influence or persuasion used by the defendant, Corbett, to get her to come to Boise. That she had fully made up her mind before leaving that she should so return and there is no evidence showing that while she was in Spokane she had changed her intention in this regard.

That the telegram of January 11th, 1923, transcript page 28, in which defendant, Corbett, stated: “Sending money to come home on. Wire when you start”, is only carrying out on the part of Corbett his prior arrangement with Nora Bishop to furnish her the money to make the complete trip.

*The Verdict of the Jury Is Contrary to
the Evidence.*

As to (a) of said Assignment of Error No. 3 we submit that the evidence herein referred to under Assignment No. 1 of Errors proved beyond all question that the transportation was for a legi-

timate purpose and not with the intent and purpose that Nora E. Bishop give herself up to debauchery and other immoral practices.

As to (b), the evidence clearly shows that there was no direct proof as to any illicit intercourse between the defendants at any time and that the jury must have inferred such association from the circumstances of their associating together at the Capital Hotel.

As to (c), there is no proof that Nora E. Bishop was transported from one state into another. As to this subdivision we desire to call the Court's attention again to the evidence adduced at the trial. Nora Bishop left her domicile in Boise, Idaho, to go to Spokane and return to her domicile at Boise. Her mission was a temporary one and as soon as the purpose for which she went to Spokane was completed she was to return to Boise. This was a continuous trip, not from one state into another but from a point in a state back to the same point in the same state.

“The transportation under the White Slave Act shall include transportation from any state or territory to any other state and territory. This definition necessarily excludes by implication transportation from one point in a state to another point in the same state. The words “from and to” used in the Act manifestly refer to two different states or territories as the respective points of origin and final destination of the transportation and not to a state through which the woman is carried

as a mere incident of the through transportation.”

U. S. vs. Wilson, 266 Fed. 712.

As to (e) of said Assignment of Errors, there was no proof that there was at any time illicit sexual intercourse between the defendants and further, there is no evidence of intent to transport for immoral purposes. Both the intent and the illicit relations, if any existed, is only proven by presuming the intent and sexual relation by inference.

A fact cannot be established by a presumption upon a presumption.

“It is not permissible for a jury to base an inference of fact upon another fact, which is only established by presumption.”

Cunnard S. S. Co. vs. Kelley, 126 Fed. 610.

“Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed.”

United States vs. Ross, 92 U. S. p. 281.

Starkie on Ev., p. 80, lays down the rule:

“In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue. It is upon this principal that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the prin-

cial and evidentiary facts and the deductions from them and does not permit a decision to be made on remote inferences."

"A presumption which the jury is to make is not a circumstance in proof; and it is not therefore a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption."

Best Evid. 95.

Jones on Evidence, Voy. 1, Sec. 104, announces the rule as follows:

"But there are certain rules of general application which may for the closing section of this chapter. Perhaps the most important is that presumption must be based upon facts and not upon inferences or upon other presumptions. The mode of arriving at a conclusion of fact by drawing inferences or by resting one presumption upon the basis of another presumption is generally if not universally inadmissible. There must be an open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. In other words, although from proof of the fact "A" the fact "B" may be presumed, and from proof of the facts "B" the fact "C" may be presumed, it does not at all follow that proof of the fact "A" producing the presumption of "B" the fact "C" may be presumed, because the fact "C" is dependent upon the proof of fact "B" and presumption is clearly not proof. Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

In the case of Chicago R. I. & Rly. Co. vs. Rhodes, 68 Pac., 58 the Court says:

"This instruction is erroneous for two reasons: First, as an abstract proposition of law, because it bases one presumption upon another, and the presumptions can only be based upon known facts."

"That as proof of a fact the law permits inferences from other facts but does not allow presumptions of facts from presumptions. A fact being established other facts may be and often are ascertained by just inferences. Not so with mere presumption of fact. No presumption can with safety be drawn from a presumption. There being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn."

Mitchell's Ex'r., 35 Pac., 443.

In the case of McK. & T. Rly. vs. Foreman, 194 Fed., p. 383 (CCA) the Court says:

"Again the process of reasoning here employed is faulty and illogical, in that it bases the negligence on a presumption and not on an admitted fact; whereas, a presumption of fact must be based upon a known or established fact and can never be founded on another presumption."

"It is a well settled rule of law that you cannot base inferences upon inferences."

O'Gara vs. Eisenlahr, 38 N. Y., 296.

Rupert vs. Brooklyn Rly. Co., 154 N. Y. 47 N. E. 971.

"Every inference must stand upon some

clear, direct evidence and not upon other inferences or presumptions."

Supra 47 N. E., 971.

As to Assignment of Error No. 6, the verdict herein is contrary to law for the reason that the Indictment No. 995 does not state a conspiracy, as there is no joint intent alleged therein and for the further reason there was no evidence that any offense was committed, as prohibited by the White Slave Traffic Act.

Indictment No. 995 charges a conspiracy to commit an offense and the offense set out that they conspired to commit was a violation of the White Slave Traffic Act. (Tr. pp. 11, 12) to induce, entice and procure the said Nora E. Bishop, alias Ellen Stone, to give herself up to debauchery and other immoral practices. There is no evidence in this case whatever of any debauchery, of Nora Bishop, either before her leaving on the journey to Spokane or after her return. All the evidence from which debauchery could possibly be inferred on her return is the defendant, Corbett' meeting her and her child at the depot, taking her to her own room at the Capital Hotel, building a fire for her, getting her a light lunch in his room, and each retiring to their own rooms about ten o'clock and when arrested about midnight each was found in their own room with the communicating doors between locked.

We submit that these circumstances would not

prove that she was transported for debauchery, as debauchery has been defined by the Federal Court.

“Debauch—to engage in the practice of debauchery and illicit sexual relations would seem to indicate a continued course of illicit sexual relations.”

Gillette vs. U. S., 236 Fed. 215.

“Debauch”—in one sense is a synonym for ‘secure’. In this case the seduction has taken place years before. We are not prepared to say that the mere fact that a woman had once or many times fallen from virtue renders a new debauching or seduction of her by an old or new lover legally impossible; but obviously, to sustain a conviction upon the assumption that to debauch means to seduce, there must be evidence that the defendant procured the transportation in order that he might more surely, more readily or more safely induce her to yield to his wishes. The evidence does not suggest that defendant’s relations with the prosecutrix had been interrupted, or that they would not have continued, had not the trip been taken.

Van Pelt vs. United States, 240 Fed. 346.

And to other practices this allegation in the indictment mean nothing. It is not set out and specified what practices were immoral. Further, the indictment No. 995 does not allege that the conspiracy was to transport a woman or girl as is required by the White Slave Traffic Act. We contend that Indictment No. 995 does not charge an offense, because there is no joint intent alleged that

she be transported for the purposes of debauchery and for other immoral practices the act to be committed.

Intent is an element of the crime and there must be a joint intent.

“The acts to be committed or done must be stated and if the conspiracy be one to commit a crime where the acts done constituting the crime must be done with an intent specified in the Statute; then the indictment for conspiracy must allege an agreement not only to do but those acts with the intent or for the purpose embraced within the intent specified in the Statute creating the offense. The existence of the intent cannot be left to inference.”

United States vs. Green, 136 Fed, p. 569.

United States vs. Crookshank, 92 U. S., 542.

We contend that it is necessary in a conspiracy charge that Ellen Stone should have the same intent as Corbett in that she be transported with the intent that she give herself up to debauchery and other immoral practices, because if it were otherwise Corbett could be convicted only upon showing his intent, while Nora Bishop could be convicted without any intent being shown upon her part. She might have agreed to the transportation for a wholly legitimate and innocent purpose and yet if there was an intent on the part of Corbett, and none on her part she would be guilty, which we do not believe to be the law.

We respectfully submit that these Plaintiffs in Error are entitled to a reversal of the judgments and the cases dismissed.

J. T. COOK,
S. L. TIPTON,
Attorneys for Plaintiffs in Error.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN R. CORBETT, sometimes know as
J. R. CORBETT, and NORA E. BISHOP,
alias ELLEN STONE,
Plaintiffs in Error.
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

On Writ of Error to the United States District
Court for the District of Idaho Southern Division.

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United States District Attorney,
JAMES F. AILSHIE, JR.,
Assistant United States District Attorney,
Residence, Boise, Idaho,
Attorneys for Defendant in Error.

J. T. COOK,
S. L. TIPTON,
Residence, Boise, Idaho,
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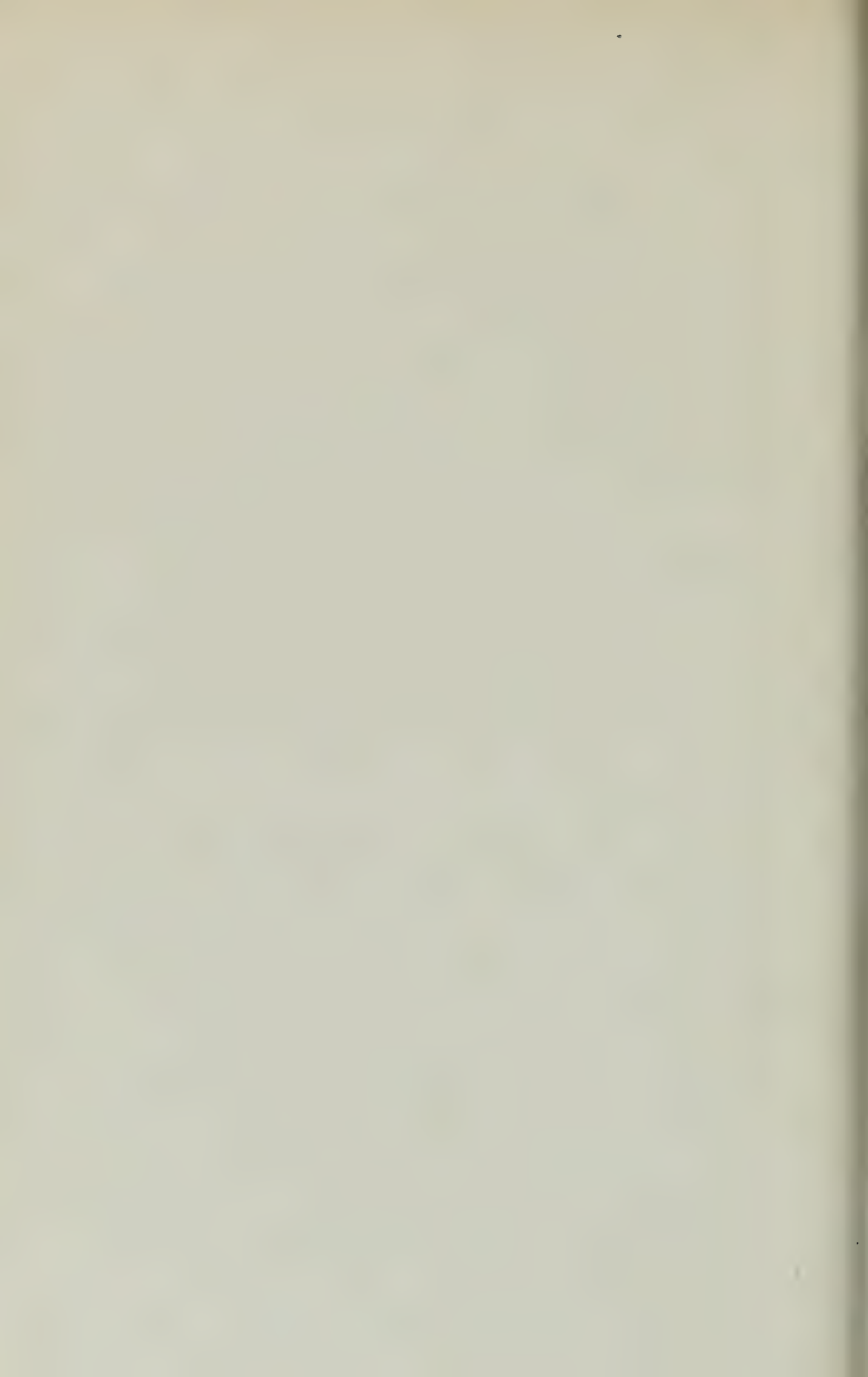
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STATEMENT OF THE CASE.

By consent of counsel two indictments were joined for trial. The first of these, No. 954, was against the plaintiff in error, John R. Corbett, alone. It charged, in Count I, the transportation, on or about the 20th day of January, 1923, of plaintiff in error Nora E. Bishop, alias Ellen Stone, in interstate commerce from Spokane, Washington, to Boise, Idaho, with the intent and purpose on the part of the said Corbett to induce, entice and compel her to engage in illicit sexual intercourse with him, the said Corbett. (Tr. pp. 7-8) This same indictment charged, in Count II, that the said Corbett, on or about the 11th day of January, 1923, persuaded, induced and enticed the said Nora E. Bishop, alias Ellen Stone, to go and be carried, and that she did go and was carried, in interstate commerce from Spokane, Washington, to Boise, Idaho, for the same immoral purposes charged in the first count of the indictment. (Tr. pp. 8-9).

The second indictment, No. 995, was against the two defendants jointly and charged a conspiracy to ~~the~~ effect the transportation charged in the first count of indictment No. 954. (Tr. pp. 10-16). This indictment is in the usual form.

At the trial, plaintiff in error Corbett was found guilty on both counts of indictment No. 954, and he and plaintiff in error, Nora E. Bishop, were found guilty as charged in indictment No. 995.

(Tr. p. 18) On indictment No. 954 the plaintiff in error Corbett was sentenced to pay a fine of One Thousand (\$1,000.00) Dollars and to be imprisoned and kept in the Ada County jail for the term of ten months. (Tr. p. 19) On indictment No. 995, he was sentenced to be imprisoned and kept in the same jail for a term of ten months, the said term to run concurrently with the term imposed under indictment No. 954. (Tr. p. 21) Plaintiff in error, Nora E. Bishop, was sentenced to be imprisoned and kept in the Twin Falls County jail for the term of three months. (Tr. p. 20) Plaintiff in error, Bishop, immediately entered upon the service of her sentence and this appeal, insofar as she is concerned, presents only a moot question.

The essential facts of this case are as follows:

Plaintiff in error, Nora E. Bishop, alias Ellen Stone, was, on October 3, 1922, in the Federal Court at Boise, Idaho, tried on a charge of embezzling post office funds. She was at that time, as also at the time of the trial in this case, a married woman, having a family of four children ranging from three to seventeen years of age. (Tr. p. 26) Corbett had met Mrs. Bishop some time prior to her trial for embezzlement on October 3, 1922. While she was in jail at Boise, awaiting that trial, she sent for Corbett and he thereafter interested himself in her defense. Following her acquittal by the jury, Corbett took her to the Capitol Hotel in

Boise where she was assigned to room 39. Later that same evening, she was moved, at Corbett's request, to room 33, this latter room being just across a narrow hallway from room 32, which was then and which for some time prior thereto had been occupied by Corbett. (Tr. p. 26) Corbett and Mrs. Bishop continued to occupy rooms 32 and 33, respectively, until about the first day of November following, when they jointly requested that they be transferred to rooms 27 and 65. These were adjoining rooms with a communicating door between. A short time later they again requested a change of rooms, this time to rooms 36 and 37. These last mentioned rooms constituted what was known in the Capitol Hotel as a housekeeping suite, room 36 being a bedroom and room 37 a kitchen. Corbett requested the landlady to place a cot in the kitchen of this suite for his use. The door between rooms 36 and 37 could be locked from either side. On the side of the door in room 37, there was an oldfashioned lock with a key and also a bolt. On the side of the door in room 36, occupied by Mrs. Bishop, there was a latch. The landlady testified that she took no account of whether the door was locked or unlocked. (Tr. pp. 26-27) They continued to occupy these rooms 36 and 37 until the 18th day of December, when Mrs. Bishop received a telegram from her daughter in Spokane, where her family was then living, couched in the following terms:

"Ted and I are going to be operated on on the twenty-first of December. Come before it is too late.

(Signed) Daughter." (Tr. p. 27)

The defendant immediately left for Spokane, where she rejoined her family and assisted in the care of her two children who had been operated upon as indicated in the telegram. She remained with them about a month. (Tr. p. 28) The defendants testified that Corbett loaned Mrs. Bishop the money on which to go to Spokane and that while she was there, between the 18th day of December, 1922, and the 19th day of January, 1923, he sent her fifteen dollars additional. (Tr. p. 28)

On January 10, 1923, Mrs. Bishop, under the name of Ellen Stone, sent Corbett the following telegram:

"Spokane, Washington, January 10, 1923.
J. R. Corbett,
Capitol Hotel,
Boise, Idaho.

Received your letter yesterday. There was a mistake. Was glad to hear from you and please do not be worried when you receive my letter.

(Signed) Ellen Stone." (Tr. p. 28)

The following day, Corbett wired Mrs. Bishop, under the name of Ellen Stone, as follows:

"Boise, Idaho, January 11, 1923.

Ellen Stone,
3809 Liberty St.,
Spokane, Washington.

Sending money to come home on. Wire
when you start.

(Signed) J. R. Corbett." (Tr. p. 28)

On the 13th of January, 1923, Mrs. Bishop, under the name of Ellen Stone, telegraphed Corbett as follows:

"Spokane, Washington, January 13, 1923.

J. R. Corbett,
Capitol Hotel,
Boise, Idaho.

Have been very poorly for past week. Will start as soon as I am able. Wire me if you think it best for me to bring Paul. Just say yes or no.

(Signed) Ellen Stone." (Tr. p. 29)

The "Paul" referred to in this telegram was the three year old son of Mrs. Bishop. In response to this telegram, Corbett wired Mrs. Bishop, under the name of Ellen Stone, as follows:

"Ellen Stone,
3809 Liberty St.,
Spokane, Washington.

Do not think so at this time. Come as soon as you can.

(Signed) J. R. Corbett." (Tr. p. 29)

On January 14, 1923, Mrs. Bishop, under the name of Ellen Stone, wired Corbett as follows:

“Spokane, Washington, January 14, 1923.
J. R. Corbett,
Capitol Hotel,
Boise, Idaho.
Will come at once.
(Signed) Ellen Stone.” (Tr. p. 29)

With the money sent by Corbett to Mrs. Bishop on January 11th, she purchased a ticket over the Oregon-Washington Navigation and Railroad Company and the Oregon Short Line Railroad Company from Spokane, Washington, to Weiser, Idaho, and on the evening of the 18th of January, 1923, left Spokane, Washington, for Boise, Idaho. While en-route, she wired Corbett from Umatilla, Oregon as follows:

“Umatilla, Oregon, January 19, 1923.
John Corbett,
Capitol Hotel,
Boise, Idaho.
Wire me a ticket to Weiser, Idaho, or meet me there. Leaving Umatilla January twentieth, five a. m.
(Signed) Ellen Stone.” (Tr. p. 30)

Complying with this telegram, Corbett purchased a ticket from the agent of the Oregon Short Line Railroad Company at Boise, paying therefor the sum of Two Dollars and Eighty-eight cents (\$2.88). This ticket was sent to Mrs. Bishop and she used the same in completing her journey from Weiser, Idaho, to Boise, Idaho. (Tr. p. 30) Mrs. Bishop brought with her, from her husband's home in Spokane, their three year old child. (Tr. p. 31)

She was met at the depot in Boise by Corbett, who carried her baggage and the two went together to the Capitol Hotel. She did not report at the desk or register but went directly to room 36 which she had occupied before going to Spokane. Corbett went with her and built a fire in her room. Shortly thereafter he made her cup of coffee in his room and she and her child had a light lunch in his room. They were arrested about midnight on a charge of violating the White Slave Traffic Act. (Tr. p. 31)

The deputy marshal who made the arrest asked the landlady of the hotel in what room he would find Corbett and she said room 36. He knocked at this door and after waiting two or three minutes, Mrs. Bishop came to the door. He asked her where Corbett was. She replied that he was in room 37. (Tr. p. 31) The deputy marshal then knocked on the door of room 37 opening from that room into the hall. After a short time Corbett came to that door and unlocked it but it would not open sufficiently to permit him to come out. It struck a commode after opening a short distance, which the witness indicated as about a foot. Corbett later moved the commode and came into the hall. (Tr. p. 32) The landlady testified that when rooms 36 and 37 were used by independent parties, this commode ordinarily stood in front of the communicating door between the two rooms and that

if it was moved toward the door leading from room 37 into the hall, so as to permit passage from room 37 into room 36, through the communicating door, the commode would then be in position where it would prevent the opening of the door from room 37 into the hall. (Tr. p. 32) This was the position in which the commode was found by the deputy marshal.

After Mrs. Bishop had been given time in which to put on some clothes, the deputy marshal stepped into her room and found the latch on the communicating door on her side unfastened. He testified that later on and before leaving the room, he found the door locked on Mrs. Bishop's side with the latch and he testified that Mrs. Bishop admitted to him that she had slipped the latch into place while his back was turned.

Mrs. Bishop testified that she was in love with Corbett and that at the time of the incidents narrated above she intended to get a divorce from her husband. She admitted, however, that up to the date of the trial, September 17, 1923, she had not commenced an action for divorce. (Tr. p. 32) Mrs. Bishop testified that at the time she left Boise to go to Spokane, she intended to return and left some of her things in room 36 at the Capitol Hotel during her absence. (Tr. p. 33) From the time that Mrs. Bishop went to the Capitol Hotel on October 3, 1922, up to the time that these parties

were arrested, on January 20, 1923, Corbett had paid the room rent for the various rooms occupied by Mrs. Bishop, notwithstanding the fact that she was employed at the Uneeda Restaurant and took her meals there. (Tr. p. 33) Mrs. Bishop testified that after their arrest, she had repaid forty dollars of this sum to Corbett. (Tr. p. 33)

A motion for a new trial was filed and was, by the court, overruled.

BRIEF OF THE ARGUMENT

The instructions requested by plaintiffs in error and refused by the court do not correctly state the law of this case, nor do the facts of the case even remotely suggest the propriety or pertinency of these instructions.

The facts of this case are wholly dissimilar to the facts in *United States vs. Wilson*, 266 Fed. 712. In that case the transportation was from Nashville, Tennessee to Chattanooga, Tennessee, with a merely incidental passage through Alabama. Here there was a distinct journey from Boise, Idaho, to Spokane, Washington and another distinct journey from Spokane to Boise. The two journeys were separated by at least a month, during which time Mrs. Bishop was with her family in Spokane where she should have remained.

The cases,

Welsch vs. United States, 220 Fed. 764;

Sloan vs. United States, 287 Fed. 91;

Van Pelt vs. United States, 240 Fed. 346;

Thorn vs. United States, 278 Fed. 932,

cited by plaintiffs in error, are not in point, the facts of those cases being wholly dissimilar from those in the case at bar.

The granting or refusing of a new trial rests in the sound discretion of the trial court and is not reviewable on writ of error.

Leuders vs. United States, 210 Fed. 419, 127

C. C. A. 151;

Ryan, et al vs. United States, 283 Fed. 975.

The appeal in this case is without merit. It presents no new, or doubtful, question of law. On the other hand, the facts of the case are so clearly within the well-settled law, applicable to violations of the White Slave Traffic Act, that the appeal is wholly without justification.

ARGUMENT

The first two assignments of error may be grouped together for purposes of discussion. They are to the effect that the court erred in refusing to give the following instructions:

“The jury are instructed, if you find from the evidence that the defendants were domiciled and living at Boise, Idaho, and that Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, State of

Washington, and returned to Boise, Idaho, and at the time of leaving Boise, Idaho, she left her position of employment both defendants fully intended that she would return to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you further find from the evidence that the defendant, Corbett, at the time of her leaving Boise, Idaho, arranged with her to furnish her the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington and return to Boise, Idaho, and if you should further find from the evidence that the defendants prior to and at the time of her going to Spokane and returning to Boise had illicit intercourse, you should acquit them."

"The jury are instructed that if you are satisfied from the evidence that the defendants were domiciled and living at Boise, Idaho, and while so domiciled and living, Nora E. Bishop, alias Ellen Stone, was transported in interstate commerce to Spokane, Washington, from Boise, Idaho, and returned from Spokane, Washington, to Boise, Idaho, and at the time of leaving Boise, Idaho, for Spokane, Washington, she left her position of employment, both of the defendants fully intending at the time she left Boise, Idaho, that she would return from Spokane, Washington, to her employment at Boise, Idaho, after having visited her children at Spokane, Washington, and if you find from the evidence that the defendant, J. R. Corbett, at the time of her leaving Boise, Idaho, for her said trip to Spokane, Washington, and return arranged with her to furnish the money and did furnish her the money to pay her transportation in interstate commerce to Spokane, Washington and return to Boise,

Idaho, and even if you should further find from the evidence that the defendants prior to and at the time of her going from Boise, Idaho, to Spokane, Washington, and returning to Boise, Idaho, had illicit intercourse, and if you further find from the evidence that he had in mind at the time of furnishing transportation that he would continue the prior illicit intercourse with her, you should acquit them."

No court reporter was used in this case and the instructions, as orally given by the court, were not reduced to writing. It was agreed, however, by court and counsel for the respective parties that no instructions were given by the court substantially covering these instructions requested by plaintiffs in error. (Tr. p. 35)

It would be difficult to say just what counsel had in mind in formulating these proposed instructions, for it is clear they do not state the law as it has been construed by the courts in cases of this character. The court did not err, therefore, in refusing to give them. Considering these instructions in the light of the argument and citation of authorities, made in the brief submitted by plaintiffs in error, it appears that the instructions were based, in part at least, upon an attempt to make it appear that the present case falls within the rule announced in *United States vs. Wilson*, 266 Fed. 712.

In that case the transportation charged was from Nashville, Tennessee to Chattanooga, Tennessee, "with a merely incidental passage through

Alabama, and not a transportation from Alabama to Tennessee within the meaning of the Act." The situation here is, however, entirely different from the situation in the Wilson case, for this is not a case where there was "a merely incidental passage" through another state. It is clear, at the outset, that in the case at bar we have two entirely separate and distinct trips. The first was the trip from Boise to Spokane made by Mrs. Bishop on December 18, 1922, when she went to the latter place to rejoin her family. At the time she left Boise, she may have intended to return there and Corbett may have understood that she would return there; but this does not alter the fact that her return was an entirely separate and distinct trip from the one she made in going from Boise to Spokane. It is clear from the record as a whole that she did not know how long she would remain at Spokane and it is also clear from the record that she did not take with her sufficient money with which to make the return trip. This had to be sent to her by Corbett when they were planning her return. (Tr. p. 28)

In another aspect these requested instructions seem to be based upon a general misunderstanding of the White Slave Traffic Act and of certain cases cited in the brief of plaintiffs in error. With much apparent reliance, opposing counsel cite *Welsch vs. United States*, 220 Fed. 764. In that case the defendant was acquitted on a charge of transporting

the victim for immoral purposes but was convicted of persuading and enticing her to make the interstate trip in question for immoral purposes. The holding of the Circuit Court of Appeals in that case was to the effect that the evidence not only did not sustain the charge of persuasion and enticement but, on the other hand, negated this charge. The only possible bearing that case could have upon the case at bar would be on the question of whether the evidence in this case was sufficient to sustain the conviction of Corbett on the second count of indictment No. 954. It could have no possible bearing upon the correctness of these requested instructions.

Another case cited by plaintiffs in error, apparently in support of these requested instructions, is that of *Sloan vs. United States*, 287 Fed. 91. In that case the defendant and the victim, both of whom lived in Illinois, had for some time prior to the transportation in question—a trip to St. Louis, Missouri—sustained immoral relations in Illinois. The court reiterated the well-known rule that, in a case of interstate transportation, under the White Slave Traffic Act, the unlawful intent specified in that Act—that is, the intent to entice, induce or compel the woman to give herself up to debauchery or other immoral practices—must be formed in the state from which the woman is transported, and that the evidence is not sufficient to sustain a conviction if it clearly appears that

this unlawful intent was first formed in the state to which the woman was transported and after the transportation was completed. The court said:

“There is nothing in the evidence to show any possible reason why he should have gone to the trouble and expense of taking her to St. Louis merely in order that he might have illicit intercourse with her.” (287 Fed. 93).

The facts of the Sloan case, and the law as there enunciated by the court, might be of some value in the present case if it were charged that Corbett had transported Mrs. Bishop from Boise, Idaho, to Spokane, Washington, for immoral purposes. This was not charged and in fact the trip which Mrs. Bishop made from Boise to Spokane forms no part of the present case.

Similarly, *Van Pelt vs. United States*, 240 Fed. 346, is cited as though it were authority in favor of the correctness of these requested instructions. The facts of that case and the phase of the White Slave Traffic Act which it illustrates are sufficiently stated in paragraph four of the syllabus to that case. This reads as follows:

“A man who procured the interstate transportation of a girl, with whom he had had intercourse whenever he sought it during the past three years, for the purpose of procuring a place where she could remain until after her confinement, cannot be convicted under the White Slave Act, though he accompanied her and anticipated that he would have intercourse

with her after she left the state, if such anticipation played no part in inducing him to procure the transportation."

Nothing derived from the law of that case can be helpful to the plaintiffs in error here, and clearly it does not even remotely tend to establish the correctness of the requested instructions in support of which the case is cited.

In this connection, also, the case of *Thorn vs. United States*, 278 Fed. 932 is cited. In that case the court held that the evidence was insufficient to sustain a conviction of the defendant,

"for knowingly causing the transportation of a girl from one state into another for an immoral purpose, where the testimony of the girl, which was uncontradicted, was that she insisted on going to a city in the other state, for reasons which she stated, and that she paid for both tickets."

Clearly there is nothing in this case which suggests the correctness of the requested instructions.

The record does not indicate just when Mrs. Bishop first separated from her family. This may have been at the time of her imprisonment on the charge of embezzling post office funds. (Tr. p. 26) The record does show, however, that she did not rejoin her family upon her release from custody on October 3, 1922, but instead took up her associations with Corbett at the Capitol Hotel in Boise, Idaho. (Tr. p. 26) These associations con-

tinued until December 18, 1922, when she left Boise and went to her family at Spokane. (Tr. p. 27) The defendant Corbett appears to have loaned Mrs. Bishop the money on which to go to Spokane and he testified that while she was there he sent her fifteen dollars additional. (Tr. p. 28) It thus appears that Corbett was undoubtedly interested in Mrs. Bishop and that he perhaps hoped and intended that she would return to him at Boise when her visit to her family was over. At the trial of the case it was not denied that Corbett had transported Mrs. Bishop back from Spokane to Boise, as charged in the first count of indictment 954, and it was admitted that on January 11, 1923, he had wired her at Spokane as follows:

“Sending money to come home on. Wire when you start.” (Tr. p. 28)

It was also admitted that he had purchased at Boise, Idaho, and sent to her at Weiser, Idaho, a railroad ticket to enable her to complete her journey to Boise. (Tr. p. 30) This left to be established, by other facts and circumstances, only the intent with which Corbett furnished the transportation as charged in the first count of indictment 954.

As to the second count of indictment 954, charging Corbett with persuading and enticing Mrs. Bishop to return from Spokane to Boise, the evi-

dence of the persuasion and enticement is contained in the following telegrams:

January 11, 1923, Corbett to Mrs. Bishop:
"Sending money to come home on. Wire when you start." (Tr. p. 28)

January 13, 1923, Mrs. Bishop to Corbett:
"Have been very poorly for past week. Will start as soon as I am able. Wire me if you think it best for me to bring Paul. Just say yes or no." (Tr. p. 29)

Corbett to Mrs. Bishop, date of telegram not shown in transcript, but in answer to telegram just above set out:

"Do not think so at this time. Come as soon as you can."

January 14, 1923, Mrs. Bishop to Corbett:

"Will come at once."

Beyond any question this was sufficient evidence to go to the jury on the question of whether or not Corbett did persuade and entice Mrs. Bishop to return to Boise, and is sufficient also to sustain the verdict reached by the jury.

With reference generally to the relations which existed between Corbett and Mrs. Bishop at Boise, prior to her going to Spokane, it is clear that however freely they may have indulged their illicit relations in Idaho, the moment Mrs. Bishop reached Spokane and rejoined her family, the situation was completely changed. The relations previously existing at Boise were, temporarily at

least, at an end. If they were to be resumed, Mrs. Bishop must be brought back from Spokane, to Boise, or at least induced to return there. She was now with her family at Spokane. That was her home. That was her place of duty. That was where her obligations to her husband and her children required her to remain. In furnishing her the transportation to return to Boise and in persuading and enticing her so to return for resumption of their immoral relations, there can be no question that Corbett violated the White Slave Traffic Act and that he was justly convicted on both counts of indictment 954.

ASSIGNMENT OF ERROR NO. III.

Under this assignment it is set out that "the verdict of the jury is contrary to the evidence." This conflict is stated in a number of specifications lettered from (a) to (1), inclusive. Under sub-head (a) it is said:

"There is no proof that the transportation in interstate commerce was with the intent and purpose that Nora E. Bishop give herself up to debauchery and other immoral practices."

The jury found otherwise; and the facts in this case, as set forth in the transcript and in this brief, are clearly sufficient to support the finding.

In sub-head (b) it is said:

"There is no direct proof as to any illicit intercourse between the defendants at any time."

In no case under the White Slave Traffic Act is it absolutely necessary to prove illicit intercourse; but, even if such proof were necessary, it would not have to be made by direct testimony.

In sub-head (c) it is said:

"There is no proof that Nora E. Bishop was transported from one state to another."

The evidence was all to the contrary, and the fact of transportation was not even questioned at the trial.

In sub-head (d) it is said:

"There is no direct proof as to Nora E. Bishop being transported in interstate commerce with the intent and purpose that she give herself up to debauchery and other immoral practices."

The fact of transportation being established and admitted, it is sufficient to observe here that intent and purpose can seldom, if ever, be shown by direct proof. It was competent to show intent by any fact or circumstance which tended to establish it.

Under sub-head (e) it is said:

"There is no proof that there was at any time, illicit sexual intercourse between the defendants."

It was not necessary in this case to prove an act of sexual intercourse as a separate and independent fact, when all the evidence showed that Corbett and Mrs. Bishop had been for a long time occupying rooms together with practically the same freedom as though they had been man and wife.

Under this assignment of error, the brief of plaintiffs in error, pages 22 to 24, inclusive, contains a discussion and some citation of authorities having to do with the principle, as stated in the brief, that "a fact cannot be established by a presumption upon a presumption." Just what the writer of the opposing brief had in mind is not entirely clear. He may have meant to say that illicit sexual intercourse between the plaintiffs in error is not shown by direct proof, but must be presumed from other facts established in evidence; and that the intent, on the part of Corbett, in transporting Mrs. Bishop from Spokane to Boise, to induce or compel her to submit herself to immoral relations with him, is a presumption which, to be established, must be based upon the presumption that illicit sexual relations actually followed the transportation. The answer to this, however, is that it is not necessary to presume any act of sexual intercourse between these parties after the return of Mrs. Bishop from Spokane. All that was necessary to be established by circumstantial evidence was the intent of Corbett in transporting her from Spokane back to Boise and this intent the

jury was at liberty to infer from all the pertinent facts and circumstances in the case. It cannot be said that these facts and circumstances were not sufficient to warrant the jury in finding that he entertained the necessary intent.

Under sub-head (f) it is said:

“There is not proof as to any illicit intercourse except circumstantial evidence of their association together in the Capitol Hotel prior to her transportation in interstate commerce from Spokane, Washington to Boise, Idaho, or upon her return to Boise, Idaho.”

There can be no valid, legal objection to circumstantial evidence to prove illicit intercourse provided it was found by the jury to be sufficient in kind and quantity to produce conviction under the instructions of the court as to the law of the case.

Under sub-head (g) it is said:

“There is no proof that any offense was committed as prohibited or denounced by the White Slave Traffic Act, or any law of the United States.”

and in sub-head (h) it is said:

“There is no proof that the transportation in interstate commerce was with any other intent or purpose than a legitimate purpose.”

These specifications call for no comment.

In sub-head (i) it is said:

“There is no evidence of a conspiracy showing any intent on the part of either of the defendants as charged in indictment No. 995.”

This evidence is found in the situation in which parties lived at Boise, prior to the time Mrs. Bishop went to Spokane, in the fact that Corbett loaned her money to pay for her transportation back to Boise and in the messages which passed between them while she was at Spokane as set out on pages 28 and 29 of the transcript.

In sub-head (j) it is said:

“There is no proof that the transportation in interstate commerce was with the intent and purpose on the part of John R. Corbett to induce, entice and compel Nora E. Bishop, alias Ellen Stone, to engage in immoral practices as set out in the first count of indictment No. 954.”

There is nothing new in this specification and it has been sufficiently covered by what has already been said:

In sub-head (k) it is said:

“There is no proof that the defendant John R. Corbett induced, enticed or persuaded Nora E. Bishop, alias Ellen Stone, to be transported with the intent and purpose that she engage in immoral practices with him as alleged in count two of the indictment No. 954.”

The proof in the record as to persuasion and enticement has already been set out in this brief, and need not be here repeated.

In sub-head (1) it is said:

“There is no proof that John R. Corbett aided, assisted or caused Nora E. Bishop, alias Ellen Stone, to be carried and transported from Spokane, Washington to Boise, Idaho, as alleged in count two of the indictment No. 954.”

There was never any question that Mrs. Bishop made the trip from Spokane to Boise over the lines of the branch of the Union Pacific railroad connecting these two points. If the evidence heretofore pointed out is sufficient to establish persuasion and inducement, the fact that the journey resulted from the inducement might properly be inferred from the other facts established.

ASSIGNMENT OF ERROR NO. IV. •

Under this assignment, it is set out that,

“The court erred in denying defendants’ motion for a new trial for the reasons set out in assignments (a) to (1), inclusive, of number 3 and assignments numbers I and 2 herein.”

It is well settled that the granting or refusing of a new trial rests in the sound discretion of the trial court and is not reviewable on writ of error.

Leuders vs. United States, 210 Fed. 419, 127
C. C. A. 151;

Ryan, et al, vs. United States, 283 Fed. 975.

ASSIGNMENT OF ERROR NO. V.

Under this assignment it is said:

"The verdict herein is contrary to the law, for the reasons set out in assignment No. 3."

What has been said in discussing assignment No. 3 and its various sub-heads is equally applicable here.

ASSIGNMENT OF ERROR NO. VI.

Under this assignment it is said:

"The verdict herein is contrary to law for the reason that the indictment does not state a conspiracy, as there is no joint intent alleged therein."

"The judgments herein are unlawful for the reasons that they are based upon verdicts unlawful and unsupported by the evidence in the particulars set out in specification No. 3, herein stated."

The second paragraph of this assignment is merely a rehash of what has been previously stated in at least two other assignments. The assertion that indictment No. 995 does not state a conspiracy for the reason that no joint intent is alleged is without merit. The indictment clearly states a conspiracy to violate the transportation clause of the White Slave Traffic Act. The only intent specified in that clause of the Act is the intent on the part of the transporter that the woman transported should give herself up, in the State to which trans-

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ported, to debauchery or other immoral practices. Such an intent on the part of Corbett is clearly alleged in indictment No. 995.

In discussing this same indictment it is stated, near the bottom of page 26 of the opposing brief, that "further the indictment No. 995 does not allege that the conspiracy was to transport a woman or girl as is required by the White Slave Traffic Act." It is true that indictment No. 995 does not specifically refer to Nora E. Bishop, alias Ellen Stone, as a woman or girl. It does, however, say that the conspiracy was that Nora E. Bishop, alias Ellen Stone, should go and be transported and that Corbett should transport and cause to be transported and aid and assist in transporting the said Nora E. Bishop, alias Ellen Stone, between the points alleged with the intent and purpose on the part of him, the said Corbett, to induce, entice and procure the said Nora E. Bishop, alias Ellen Stone, to give herself up to debauchery and to other immoral practices. Regardless of what may have been the ruling, if this indictment had been demurred to before trial, it is clear that after trial and after the verdict, Nora E. Bishop, alias Ellen Stone, having appeared as a woman and having admitted (Tr. p. 26) that "she was at that time and is now, a married woman, having a family of four children ranging from three to seventeen years of age," it cannot be contended that the indictment

is insufficient in not having more specifically referred to her as a woman or girl.

We submit that the appeal to this court is clearly without merit; that no new or doubtful points of law have been raised; that the time of this court will have been needlessly consumed; and that the verdict of the trial court should be affirmed.

E. G. DAVIS,
United States Attorney,
for the District of Idaho,

JAMES F. AILSHIE, JR.,
Assistant United States Attorney,
for the District of Idaho,
Residence, Boise, Idaho,
Attorneys for Defendant in Error.

